IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-180

HENRY SMITH, etc., *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *et al.*,

Appellees.

No. 76-183

BERNARD SHAPIRO, etc., *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *et al.*,

Appellees.

No. 76-5193

NAOMI RODRIGUEZ, *et al.*,

Appellants,

v.

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Appellees.

(continued)

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No. 76-5200

DANIELLE GANDY, *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANTS NAOMI RODRIGUEZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS NAOMI RODRIGUEZ, *ET AL.*

OPINION BELOW

The majority opinion of the three-judge District Court (Lumbard, C. J.; Carter, J.) and the dissenting opinion (Pollack, J.) are reported at 418 F.Supp. 277 (S.D.N.Y. 1976). These opinions are also reproduced in the several Appellants' Joint Appendix to Jurisdictional Statements[1] as Appendices "A" and "B", respectively.

Also reproduced in Appellants' Joint Appendix to Jurisdictional Statements are the following:

(a) The Order and Judgment Appealed From, dated April 14, 1976, as Appendix "C".

(b) The Opinion and Order of Carter, J., dated March 22, 1976, on class certification, as Appendix "E".

(c) The Opinion and Order of Carter, J., dated December 10, 1974, on assignment of separate counsel for the children, as Appendix "G".

[1] Hereinafter referred to as A.J.S.

JURISDICTION

This class action was commenced by Appellees in the United States District Court for the Southern District of New York pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202 and 28 U.S.C. §§1343(3) and 1343(4), to declare unconstitutional and enjoin the enforcement of New York Social Services Law §§383(2) and 400 and 18 New York Code Rules and Regulations §450.14.[2] By Order entered August 19, 1974, a three-judge Court was convened pursuant to 28 U.S.C. §§2281 and 2284. The Judgment and Order of the three-judge District Court (Pollack, J., dissenting) declaring the statutes and regulation unconstitutional and enjoining their enforcement was entered on April 14, 1976 and stayed for 30 days pending an application for a further stay to this Court. On the basis of such an application, an interim stay was granted by Mr. Justice Marshall on May 12, 1976 pending referral to and further order of the Court.

On May 24, 1976, the Judgment and Order was stayed by this Court, pending the timely docketing of an appeal or appeals, ____ U.S. ____, 48 L.Ed.2d 813 (1976). A Notice of Appeal was filed by Appellants Rodriguez, et al. in the United States District Court for the Southern District of New York on June 10, 1976 (A.J.S., Appendix "D"). Three other parties to the action also appealed (A.J.S., Appendix "D"). Separate Jurisdictional Statements were filed on August 9, 1976 by all four Appellants, and probable jurisdiction was noted and appeals consolidated on October 12, 1976, ____ U.S. ____, 50 L.Ed.2d 164 (1976). Jurisdiction on appeal is conferred by Title 28 U.S.C. §1253.

[2] Since renumbered §450.10 and hereinafter referred to by that number.

STATUTES AND REGULATION INVOLVED

The constitutionality of two state statutes, New York Social Services Law §§383(2) and 400, and of a state administrative regulation, 18 N.Y.C.R.R. §450.10, was directly challenged by Appellees foster parents. These have been reproduced in Appendix "1" to this Brief. Not directly challenged by Appellees, but also involved, were, *inter alia*, the following: The Due Process Clause of the Fourteenth Amendment to the Constitution; New York Social Services Law §§392, 383(1), 383(3) and 384-a; Domestic Relations Law §§110 and 111; Family Court Act §611; and Social Services Law §384-b. The text of these and other relevant Statutes, Administrative Regulations, Rules and Procedures are reproduced in Appendices "2" to "8" to this Brief.[3]

QUESTIONS PRESENTED

1. Did the District Court have power, under Article III, §2 of the Constitution, to determine the rights of children to notice and a prior hearing in this action, when court-appointed counsel for the children opposed such relief as harmful to children, and the foster parents, the only party who claimed this relief for the children, were disqualified from doing so?

2. Does the Constitution require notice and a hearing to children whose parents have voluntarily placed them with public officials for temporary foster care, and not for adoption, prior to return of the children to their natural parents, when the children have lived in a foster home for a year or more?

[3] Hereinafter A.A.

3. Did the District Court properly certify a class of all children who have lived in a foster home for more than *one* year, regardless of their ongoing relationship with their natural parents, when the only named class representatives had spent more than *four* years in foster care and had no contact with their natural parents?

4. Was Due Process of Law under the Fourteenth Amendment denied to Appellant parents when the District Court refused to let their witness testify at the trial on March 3, 1975 and limited the defenses they could raise?

STATEMENT OF THE CASE[4]

A. Proceeding below

This is a class action to declare unconstitutional and enjoin the enforcement of New York statutes and a regulation[5] which are alleged to permit children to be removed from foster homes (to return to their parents or to go to other foster homes or adoptive placements) without an adequate prior hearing. Plaintiffs are a New York organization called Organization of Foster Families for Equality and Reform ("O.F.F.E.R.") and three sets of foster parents. The foster parent Plaintiffs were all licensed to board children,[6] and had foster

[4] This Statement of the Case is made on behalf of all parties appellant and contains matter relevant to all their appeals. However, the Argument presented relates only to the Appeal of Rodriguez et al.–parents of children in foster care.

[5] New York Social Services Law (N.Y.S.S.L.) §§383(2) and 400; 18 New York Code Rules and Regulations (N.Y.C.R.R.) 450.10.

[6] The provisions governing the licensing of foster parents in New York are Social Services Law §§375through 382; 385-386; and 18 N.Y.C.R.R. Rule 7.5.

children in their homes pursuant to contract between the foster parents and child care agencies authorized by New York State (A. 76a-81a). As foster parents they received a stipend for the care and maintenance of the children from a combination of federal, state and local funds. Custody of the children was with the local Commissioner of Social Services by delegation of the children's natural parents and pursuant to law, N.Y.S.S.L. §383(2). (See A. 63a-67a)

The foster parents commenced this action in the United States District Court for the Southern District of New York on May 9, 1974. They originally sued on their own behalf and on behalf of foster children in their care, and alleged that the statutes and regulation permitting children to be removed from the foster homes denied due process and equal protection of the law to both foster parents and children. The named plaintiffs were granted temporary restraining orders against the removal of the foster children from the foster homes (A. p. 3a #2, #5; p. 4a #16; p. 5a #33).

The original Defendants are various officials of the New York State and local Departments of Social Services responsible for the provision of foster care services in New York. Since no natural parents were named as defendants, four mothers of children in voluntary foster care moved to intervene in the action as Intervenor-Defendants.

On August 19, 1974, Judge Robert Carter allowed the natural parents to intervene, but disallowed the natural parents' cross-claim against the Defendants. On the same date, Judge Carter requested the convening of a three-judge court pursuant to 28 U.S.C. §§2281 and 2284 (A. 39a-41a).

On October 25, 1976, Judge Carter informed the parties informally that he was removing counsel for the foster parents as counsel for the children and

appointing Mrs. Helen Buttenwieser to be independent counsel for the children. On November 13, 1975, Mrs. Buttenwieser filed an Answer on behalf of the children denying each and every allegation of the foster parents' complaint and alleging that the interests of the children "would be vitally and adversely affected by the granting of the relief prayed for in the Second Amended Complaint." (See A.J.S. Appendices "G", p. 57a and "H", pp. 70a-71a.)

On December 11, 1974, Judge Carter by Decision and Order formally reaffirmed his decision both to appoint separate counsel for the children and to assign Mrs. Helen Buttenwieser to serve in that capacity. Judge Carter held that there was an inherent conflict of interest between the foster parents and the foster children. Based upon the pleadings and affidavits filed by the foster parents' attorney, Judge Carter held that this attorney could not adequately represent the children (A.J.S. Appendix "G", pp. 57a, 58a and 62a).

The foster parents filed a Notice of Appeal from this Order to the United States Court of Appeals for the Second Circuit, but then withdrew it without prejudice on or about February 5, 1975[7] (A. 6a #62, 7a #74). Pending the resolution of the Appeal, no further proceedings were permitted by Judge Carter. Judge Carter refused to consider Mrs. Buttenwieser's motion to dissolve the previously issued temporary restraining orders preventing the Defendants from moving the children who were named as parties to the action (A. 7a #64).

---

[7] Foster parents again sought to have Mrs. Buttenwieser removed or supplemented by other counsel after the final judgment below was entered; they were unsuccessful in the District Court, the Circuit Court of Appeals for the Second Circuit, and in this Court.

About February 10, 1975, Judge Carter informed the parties that he was ordering the case to trial, and that trial would be limited to one day. At the trial, held on March 3, 1975, the attorneys for the Plaintiffs and for the children presented various witnesses in support of their separate contentions (A. Index ii-iii). Counsel for the parents of children in foster care, however, were not permitted to present their witnesses (A. 305a-307a). At the conclusion of the trial, the Court dissolved the previously issued temporary restraining orders (R-84, p. 192). Depositions of experts and public officials were subsequently taken in lieu of trial testimony.

On March 22, 1976, the Court issued its opinion. The majority opinion of Judge Lumbard, joined by Judge Carter, held that before a foster child can be transferred from his foster home to another foster home or discharged to his natural parents, the child is entitled to a prior hearing (Appendix "2" to this Brief). Judge Pollack dissented on the ground that the Court should not have decided whether foster children were entitled to a hearing, when their own lawyer opposed this relief as harmful to them. The dissent further argued that due process in the context of the foster care system does not require hearings, as mandated by the majority opinion (A.J.S., Appendix "B").[8]

On the same date, Judge Carter by Opinion and Order certified a class of foster parents in whose homes foster children had resided for more than one year, a class of children who have lived in a particular foster home for more than one year, and a class of all natural parents with children voluntarily placed in foster care for approximately one year (A.J.S., Appendix "E").

[8] The majority opinion was amended on March 29, 1975; the dissent on March 25, 1975.

The Judgment and Order of the three-judge Court, including denials of motion to reargue which had been made, was filed on April 14, 1976 (A.J.S., Appendix "C").

B. State court proceedings

Several State court proceedings are part of the procedural history of this case:

1. In August 1974, Mrs. Patricia Wallace, who was not a party to this action, but whose four children were named as parties, initiated a habeas corpus proceeding in the Supreme Court of the State of New York for Nassau County for the return of her four children to her. The Nassau County Commissioner of Social Services and the foster parents, Dorothy and Walter Lhotan, were named as Respondents. A law guardian for the children was assigned by the State Supreme Court. After trial in March 1975, and an additional rehearing in October 1975, the trial judge ordered the return of all the Wallace children to their mother–two children to be returned immediately and two at a later date. The Trial Court's decision was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department in February 1976. On April 9, 1976, the New York Court of Appeals dismissed the appeal filed by the foster parents and denied their motion for leave to appeal, 51 App. Div. 2d 252 (2d Dept. 1976), appeal dismissed, motion for leave to appeal denied, 39 N.Y. 2d 705 (1976).[9]

2. In October 1974 Appellant Naomi Rodriguez instituted a custody proceeding in the Family Court of

[9] The State Trial Court decisions were not reported, but are reproduced in Appendix "9" to this Brief.

the State of New York for the return of her child Edwin to her, pursuant to Family Court Act §651; Respondents were the Commissioner of Social Services of the City of New York and Harlem Dowling Children's Services. In June 1975 Mrs. Rodriguez' petition for custody was denied by the Family Court. In June 1976 the Appellate Division of the Supreme Court of the State of New York reversed the judgment of the Family Court and directed that plans for Edwin's return to his mother be implemented forthwith. That decision is reported at ____ A.D. 2d ____, 383 N.Y.S. 2d 883 (1976).

3. At the time this action was commenced, all the foster parents named in this action were parties to separate foster care review proceedings pursuant to Social Services Law (S.S.L.) §392 pending in the Family Court of the State of New York for New York County and Nassau County, with respect to the foster children in their care—the children named as parties to this action. The cases of Plaintiffs Madeline Smith and Ralph and Christiane Goldberg were actually on the calendar for hearings in the Family Court, New York County, in April 1974 (R-48 Gans Afdvt.). Apparently the proceedings continued, but it is not clear what happened in the interim. In the case of Plaintiff Smith and the Gandy children, after hearings an Order was made in November 1976 leaving the children in Mrs. Smith's care, but not permitting her to proceed to free the children for adoption. This Order is annexed as Appendix "11" to this Brief.

Mr. and Mrs. Lhotan participated in a S.S.L. §392 foster care review concerning all the Wallace children in 1972, after which the Family Court had continuing jurisdiction of the matter pursuant to S.S.L. §392(10).

FACTS OF THE CASE

The Parties

(a) Foster Parents-Plaintiffs

Mrs. Madeline Smith

Mrs. Madeline Smith is a foster parent under the supervision of the Catholic Guardian Society of New York. She and the agency entered into an agreement which included the provision that "the child shall be returned to the agency upon request, realizing that such request will only be made for good reason" (A. p. 79a). The agency, as agent of the Commissioner of Social Services of the City of New York, placed the children Eric and Danielle Gandy with her for foster care in February 1970. They have remained in Mrs. Smith's home continuously since then. The children have had no contact with their mother; they were alleged to be but are not, in fact, legally free for adoption, (A. p. 21a).

In January 1974 a visit to Mrs. Smith by her social worker revealed that Mrs. Smith had developed extreme difficulty in walking. As a result, the agency became concerned that Mrs. Smith's physical condition unduly limited the children's activities, placed excessive responsibilities on them, and prevented Mrs. Smith from being able to protect the children in case of fire or other danger. She was asked to submit a medical report on her condition to the agency. Mrs. Smith was examined by her own physician and informed her case worker that she was forwarding his report to the agency. The last sentence of this report, which was received by the agency, was obliterated; the obliterated sentence was determined to be the following; "The patient in my opinion is totally disabled." Following a

meeting between the case worker and Mrs. Smith concerning the doctor's report, Mrs. Smith was told that she would be receiving a removal notice regarding the foster children, pursuant to 18 N.Y.C.R.R. 450.10.

On March 19, 1974, the Catholic Guardian Society caseworker consulted with the Bureau of Child Welfare of the New York City Department of Social Services. The Bureau advised, on the assumption that Mrs. Smith wanted a pre-removal conference pursuant to 450.10, that such conference would not be held until after the foster care review hearing which, pursuant to S.S.L. §392, was scheduled to be heard in the Family Court of the State of New York for New York County on April 24, 1974. On March 29, 1974, the Catholic Guardian Society formally notified Mrs. Smith of its decision to move the Gandy children out of her foster home by delivering to her the 10-day notice of removal required by 18 N.Y.C.R.R. 450.10 (A. 7a #42, Affidavit of Bracha Graber).

Mrs. Smith indicated on this notice that she was waiving the 10-day notice and did not request that the conference offered in the notice be scheduled (A. 37a).

On April 24, 1974, the parties to the foster care review, including Mrs. Smith, appeared in Family Court. It is not clear what transpired at that hearing, except that the Court directed that the children remain in foster care, and that Mrs. Smith asked for and was given an adjournment, so that she could secure a lawyer. Mrs. Smith had secured Ms. Lowry as counsel by May 3, 1974 (A. 3a #2, R-50, pp. 25-26). The pendency of the 392 proceeding was not disclosed to the District Court when this action was commenced on May 9, 1974, and a temporary restraining order against the removal of the Gandy children was secured (A. 3a #2). However, Mrs. Smith continued to participate in the proceeding. (See A.A. "11".)

Ralph and Christiane Goldberg:

Ralph and Christiane Goldberg are foster parents supervised directly by the Bureau of Child Welfare (Special Services for Children). They and the agency entered into an agreement which stated in part:

> "4. The Department of Social Services has the responsibility for planning for the child, including decisions for his removal from the foster home, either to his own family or placement elsewhere.
>
> "5. We agree to cooperate and comply with all plans of the Department of Social Services for the transfer or discharge of a child from our home." (See A. 76a-78a)

The agency placed the child, Rafael Serrano, for foster care with the Goldbergs in July 1969; at that time, he was six years old. Rafael was not free for adoption. The Second Amended Complaint alleged that his parents had signed a voluntary placement agreement under threat of a child abuse proceeding. (A. 19a)

When this action was commenced in May 1974, no decision to move Rafael out of the Goldbergs' home had been made (A. 297a-299a), and no written notice of removal pursuant to 18 N.Y.C.R.R. 450.10 had been received by the Goldbergs (A. 296a). Rafael had not seen his parents in over a year (A. 26a). The Goldbergs were aware that the agency was trying to make a permanent place for Rafael; they were undecided as to whether or not they wanted to adopt Rafael, if that were legally possible (A. 298a-299a). The agency had tried to arrange visits between Rafael and an aunt of his (A. 27a).

While the Second Amended Complaint alleged that Rafael was about to be removed from the Goldberg home to that of his aunt (A. 26a-27a), it made no reference to a pending foster care review §39?

proceeding concerning Rafael. At the trial in the District Court, however, Mrs. Goldberg testified that the only specific occasion which the witness could recall when possible removal of the foster child was discussed was at a hearing at a foster care review proceeding held pursuant to S.S.L. §392 in the New York Family Court in April 1974, of which she had had notice, at which she had been present, and where she had an opportunity to be heard (A. 298a-299a).

Walter and Dorothy Lhotan

Walter and Dorothy Lhotan were foster parents under the supervision of the Nassau County Department of Social Services Children's Bureau. The foster parent agreement which they signed with the Children's Bureau is substantially the same as those signed by Plaintiffs Smith and Goldberg (R-105).

The two older Wallace children, Cheryl and Patricia, were placed in the Lhotan home for foster care in September 1970; the two younger Wallace children, Cynthia and Cathleen, were transferred from another foster home to the Lhotan foster home in September 1972. Mrs. Lhotan testified that during this time the children's mother, Mrs. Wallace, rarely visited the children (A. 303a). Mrs. Lhotan testified that on June 26, 1974, she was informed that the agency had decided to return the two younger girls to their mother and transfer the two older girls to another foster home. According to Mrs. Lhotan, the only reason given them for the agency's decision was that the Wallace children loved the Lhotans too much (R-84, pp. 159-160).

On June 28, 1974, the Lhotans received formal notice pursuant to 450.10 that the children would be moved; they requested a conference, which was scheduled for July 9, 1974 (A. 4a, #16, affdvt.). On July 8, 1974, the Lhotans moved to join this action (A.

4a #16), and the conference never took place. Mrs. Lhotan testified that in 1972 she had been party to a S.S.L. §392 foster care review proceeding in Family Court which concerned all the Wallace children (A. 304a).

The decisions of the Appellate Division, as well as of the State Supreme Court in the custody proceeding brought by Mrs. Wallace for the return of her children to her, illuminate the manner in which the Nassau County Department of Social Services Children's Bureau reached its decision to move the Wallace girls out of the Lhotan's foster home.

According to the Appellate Division, an agency social worker made numerous visits to the Lhotan home between August 1973 and May 1974, and on the basis of these visits the social worker became convinced that Mrs. Lhotan

> "... does not cooperate with the agency, that the girls are being psychologically harmed, that the social worker's efforts to better the children's relations with their mother have caused a shift from subtle to overt hostility on the part of Mrs. Lhotan and that the children now refuse to speak to the social worker. The social worker concluded that, consciously or unconsciously, Mrs. Lhotan had frustrated all efforts to improve the relationship between the children and their mother." (51 A.D. 2d at 255)

On May 22, 1974, the agency referred the matter for psychiatric consultation. Two psychiatrists, a psychiatric social worker and a psychologist conducted the evaluation and recommended that the younger girls, Cynthia and Cathleen, be returned to their mother; with respect to the older girls, Cheryl and Patricia, the team recommended that they be transferred to another foster home prior to return to their mother.

Both the Appellate Division and the Trial Court noted that the Lhotans had never expressed a desire to adopt the Wallace girls (if that were possible), nor did they affirmatively seek their custody, *State ex rel Wallace v. Lhotan*, 51 A.D. 2d at 257 (1976) (Appendix "9" to this Brief). The Appellate Division agreed with the findings of the New York Trial Court that "the strongly expressed aversions of the children toward their mother are explained by the controlling influence of the Lhotans and the children's fear of being reared apart," 51 A.D. 2d at 257 (1976).

(b) O.F.F.E.R. Plaintiff

The Organization of Foster Families for Equality and Reform is another party Plaintiff. The Second Amended Complaint alleged that "O.F.F.E.R. was organized to provide forums for foster parents to discuss common problems with respect to their relationship to the public officials and child care agency representatives under whose authorization they receive foster children and to gather information with regard to foster parents' rights." (A 18a) The individual Plaintiff foster parents were not alleged to be members of this New York organization.

(c) Foster Children

Eric and Danielle Gandy

At the time of the commencement of this action, Eric was eight years old and alleged to be retarded; Danielle was six years old. Both had allegedly been placed in the custody of the Commissioner of Social Services by their mother–six years earlier in 1968 (A.

18a). They were placed for foster care in Mrs. Smith's home in 1970 and resided there for four years. They were alleged to be but were in fact not legally free for adoption and had had no contact with their mother since at least 1970 (A. 18a, 21a; A.A. "11"). Because of Mrs. Smith's severe arthritis and virtual inability to walk, Danielle walked to school alone across main thoroughfares, and Eric did all the household shopping. Pursuant to S.S.L. §392, a foster care review proceeding concerning these children was scheduled to be heard in Family Court in New York County in April, 1974. This proceeding, in which the children were separately represented by counsel, eventually resulted in the Order of November 1976 (A.A. "11" of this Brief). The Order makes clear that the children will remain with Mrs. Smith, under continued supervision of the agency.

Rafael Serrano

Rafael Serrano was 11 years old when this action was commenced. He had been placed in foster care by his parents six years earlier, allegedly under the threat of child abuse proceedings. After stays in a number of other foster homes, Rafael was placed for foster care with Ralph and Christiane Goldberg, and by May 1974 had been there for five years (A. 26a). When Rafael arrived in the Goldberg's home in 1969, he was an extremely disturbed child; his condition has greatly improved in the interim (A. 25a-26a). According to the Second Amended Complaint, in 1974 Rafael had not seen his parents in well over a year (A. 26a). A foster care review proceeding was scheduled to be heard concerning Rafael in April 1974. This was the same proceeding to which Plaintiffs Goldberg were parties.

Cheryl, Patricia, Cynthia and Cathleen Wallace

Cheryl and Patricia were almost 12 and 11 years old, respectively, when they joined this action; their two younger sisters, Cynthia and Cathleen, were almost 8 and 9 years old at that time. The Wallace girls were four of the six children of Patricia Wallace; they have two younger brothers, John and William. Their mother voluntarily placed these children in foster care in September 1970. "At the time she was unable to care for them and had severe emotional problems consistent with post partum depression." *State ex rel Wallace v. Lhotan*, 51 A.D. 2d 253. Initially, Cheryl and Patricia were placed immediately with the Lhotans, Cynthia and Cathleen were placed with a Mr. and Mrs. Dunne, and John and William were placed with the Hanson family. In September 1972 Cathleen and Cynthia were also placed in the Lhotan home, while in December 1972 the two boys were returned to their mother. At the time the Wallace girls joined this action, they had been in foster care for four years. The girls had had virtually no recent contact with their mother, and their expressed attitudes toward her were hostile and rejecting. They wanted to remain with the Lhotans, *State ex rel Wallace v. Lhotan*, 51 A.D. 2d 254, 255.

The oldest girl, Cheryl, graphically portrayed her mother as neglectful and uncaring (A. 4a #16, Affidavit and Exhibit). This portrayal was, however, rejected by the Nassau County Supreme Court:

> "It is the Court's determination that, aside from an isolated incident of September, 1970, concerning which the testimony is in dispute, there is no credible evidence upon which the Court could base a finding that Mrs. Wallace neglected her children. Nor is there such credible evidence that Mrs. Wallace maintained a course of conduct of entertaining boy friends in the home, or of leaving the children unattended." (A.A. "9")

The girls' hostility toward their mother carried over to their agency worker, Mrs. Clingan, to the point at which "the children now refuse to speak to the social worker," *State ex rel Wallace v. Lhotan*, 51 A.D. 2d 255. However, at the trial in this action, Cheryl testified that she had not been, but wanted to be, consulted about the agency decision that she should leave the Lhotan home (A. 305a).

(d) Intervenor-Appellants—Parents

Mrs. Naomi Rodriguez

Naomi Rodriguez is one of the mothers of children voluntarily placed in foster care who moved to and were permitted to intervene in this action as Defendants. A young blind mother, she voluntarily placed her newborn son, Edwin, in foster care in March 1973. She placed her child because of marital difficulties—her husband had struck her on many occasions. Although she was caring for an older child at home, she was fearful for the infant's safety under these circumstances. Foster care placement had been suggested to Mrs. Rodriguez as a temporary solution by a hospital social worker (A. 69a). The Voluntary Placement form signed by Mrs. Rodriguez and her husband (A. 63a-64a) contains no reference to foster parents, does not specify the duration of the foster care placement (or its limits), and, except for warning as to the consequences of abandonment, does not discuss any procedures or conditions for the return of the child to his parents. In addition to signing the Placement form, Mrs. Rodriguez believed the verbal assurances of the worker from the Bureau of Child Welfare that placement was for a period of up to six months (A. 69a), and that she could have her child returned to her when she so requested.

The Commissioner of Social Services placed Edwin in a foster home under agency supervision. In May 1973, three months after she signed the Placement form, Mrs. Rodriguez separated from her husband and went to live with her mother. At this point she asked the agency to return the child to her. The agency neither returned the child nor told Mrs. Rodriguez what they planned to do. For months, Mrs. Rodriguez telephoned and made personal trips to the agency without receiving an answer. Finally, in January 1974 the agency worker told her orally that she needed additional mobility training to cope with her blindness, as well as a larger apartment. Mrs. Rodriguez was not advised that she could seek the return of her child in a court proceeding, nor was the agency obliged to seek a court order supporting its refusal to return the children. Finally, in April 1974 a member of her family suggested that she consult a lawyer; at this point Edwin had already been in a foster home for "a year or more". Mrs. Rodriguez visited Edwin whenever she was permitted to do so by the agency–once or twice a month (A. 70a). In August 1974 she became a party to this action (A. 39a-41a). In October 1974 she initiated a custody proceeding in the Family Court Act (F.C.A.) §651. The trial was not concluded until June 5, 1975, when her petition was denied. Following appeal to the Appellate Division of the Supreme Court of the State of New York, in June 1976, the Family Court decision was reversed. Edwin was ordered returned to Mrs. Rodriguez three years and three months after she had placed him in foster care, and approximately three years after she first sought his return, *Matter of Proceeding for Custody: Rodriguez v. Dumpson*, ____ A.D. 2d ____ (1st Dept. 1976) 383 N.Y.S. 2d 883.

Ms. Mary Robins

Mary Robins placed her two children, Corrie Lee and William, in foster care while in the hospital. She had been hospitalized suddenly for an undiagnosed illness (A. 6a #43). The placement form signed by Ms. Robins did not place a limit on the duration of foster care placement and made no mention at all of foster parents. The form also stated, "I understand that when the reason for placement no longer exists, I should ask for the child's return and that the Commissioner will return the child, provided that the Commissioner is satisfied that I am able to care for the child." (A. 65a)

When Ms. Robins moved to join this action, her children had not been returned to her despite her requests. Ms. Robins visited the children regularly; meanwhile, they were in a foster home (R-43).

Lillian Collazo

Lillian Collazo placed her newborn child, James, in foster care in January 1974. She had been wrongly denied public assistance and had no apartment to which she could bring the child. She signed the same placement form as was signed by Appellant Robins (R-42, Annexed as Exhibit). She visited her child regularly to the full extent permitted by the agency, but in October 1974, when she moved to join this action, her child was still in foster home care (R-43, Affidavit of Lilliam Collazo).

Dorothy Nelson Shabazz

Appellant Dorothy Nelson Shabazz placed her five children, Ronald, Amarah, Albayan, Jamilah and Maryam, ranging in age from three months to six years, in foster care in May 1974. She had been wrongly accused of neglecting them. After she secured counsel, a neglect proceeding pursuant to Article 10 F.C.A. was

instituted against her: the proceeding was dismissed by the Family Court of Bronx County, and the children were returned to her. The order of dismissal is annexed as A.A. "10".

New York Proceedings and Procedures for Placement of Children

In the State of New York, children may be placed in foster care *coercively* as a result of a Court order determining that a child is abused, neglected, in need of supervision, or delinquent (N.Y.F.C.A., Article 10 and 7) or *voluntarily* by consent of the child's parent (formerly N.Y.S.S.L. 384(2), now S.S.L. 384-a).[10] The two types of placement, *coercive* and *voluntary*, are governed by entirely separate and distinct statutes and procedures in the New York State statutory scheme.

Coercive placement occurs in the context of Article 10 of the New York Family Court Act[11] which provides for a full judicial proceeding wherein children may be adjudged "abused" or "neglected" and ordered removed from the home of their parents in accordance with a statutory definition (F.C.A. §1012). The provision of due process of law to parents and children is an expressed goal of Article 10 proceedings. (F.C.A. §1011). There is provision for notice of charges and a

[10]Neither form of placement results in adoption or availability of a child for adoption. Adoption can only occur after termination of parental rights or surrender, "Adoption is the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other person." New York Domestic Relations Law §110. Only adoption creates a new parent-child relationship.

[11]Hereafter F.C.A.

judicial fact finding (F.C.A. §§1031, 1035, 1036, 1041, 1044). Parents and children have the right to be represented by counsel, F.C.A. §§249, 262, *Matter of Ella B.*, 30 N.Y. 2d 352, 334 N.Y.S. 2d 133 (1972). In cases of imminent danger to the life and health of a child, Article 10 provides authority for emergency removal of a child from the home pending a determination of whether a child is abused or neglected (F.C.A. §§1024-1029). If, after hearing, a child is found to be abused or neglected, a dispositional hearing is provided (F.C.A. §§1045), at which the Court may determine that the child should remain at home, with or without supervision, or be placed in the custody of a relative or with the Commissioner of Social Services, F.C.A. §§1055(b)(i). A placement with the Commissioner of Social Services may be made from up to 18 months; if, at the end of the 18-month period, the child is still in the Commissioner's custody, a formal judicial extension of placement hearing is held, F.C.A. §1055(b)(ii). If a child has been in a foster home during placement, the foster parents are given notice of and may participate in the extension of placement proceedings after the 18-month period, F.C.A. §1055(b)(iii). At this hearing, the Family Court may decline to extend the placement and discharge the child to his parents, may require that further efforts be made to assist in the rehabilitation of the family, or direct that legal proceedings be commenced to terminate parental rights and make the child available for adoption, F.C.A. §1055(b), S.S.L. 384-b, F.C.A. §611.

The statutory scheme for *voluntary* foster care[12] placement is entirely different.

Pursuant to state and federal requirements, S.S.L. §§395, 397(1), 398(1), Title XX Social Security Act

[12]Children may also be voluntarily surrendered for adoption, S.S.L. §384(1)(2).

42 U.S.C.A. 1397(3), New York State, through its Department of Social Services and local Commissioners of Social Services[13] offers foster care as a service to families of "destitute" children.[14]

Children are placed in voluntary foster care primarily in cases of parents' emotional breakdown, as in the case of the Wallace children's mother; parent's physical illness as in the case of Appellant Mary Robins; and family conflict, as in the case of Appellant Rodriguez. Voluntary foster care is also a vehicle for securing special education and treatment for disturbed children.[15]

Voluntary placement of a child occurs simply by the parent's signing of a placement form. In contrast to proceedings pursuant to Family Court Act Article 10,

[13]The State is divided into local Social Services districts by county, except for New York City, where five counties constitute one district.

[14]S.S.L. §371.3 defines a destitute child as a child who, through no neglect on the part of its parent, guardian or custodian, is:

(a) destitute or homeless, or
(b) in a state of want or suffering due to lack of sufficient food, clothing, or shelter, or medical or hospital care.

This category overlaps with defective and handicapped children (S.S.L. §§371.8, 371.9, 398.4) and children born out of wedlock (S.S.L. §398.5).

[15](A. Jenkins, pp. 99a-101a.) Children who are adjudicated abused or neglected enter foster care not by voluntary placement but rather by order of the Family Court in Article 10 proceedings. 20% of the children in Professor Fanshel's and Professor Jenkins' longitudinal study were placed through the Family Court, A. Fanshel, p. 73. This roughly matched the proportion of neglected to dependent children reported on by Robert Catalano, A. pp. 117a-119a.

no Court or attorney is involved in this placement,[16] but only the parent and a caseworker from the local Department of Social Services. The signing may take place at home, in the caseworker's office, or in a hospital. The form may be signed prior to the actual placement of the child, but is frequently signed afterwards, since many placements are unplanned and occur in emergencies.[17] Once a child is placed, the local Commissioner of Social Services has custody of the child who is not classified as dependent, Social Services Law §§383(2), 371. The Commissioner provides foster care for the child directly or through an authorized agency, S.S.L. §§398.6(g), 371.10. The agency in turn licenses and contracts with foster parents for the care of individual children, S.S.L. §§375-382, 18 N.Y.C.R.R. 7.5.

The Commissioner of Social Services has always had power to consent to the return of a voluntarily placed child to his or her parents, S.S.L. §383(1). Prior to the enactment of §384-a. if a local Commissioner refused to consent to the child's return, the parent's only remedy was to institute a habeus corpus proceeding, N.Y.C.P.L.R. Article 70; F.C.A. §651. If the parent

[16]Effective August 24, 1976, S.S.L. §384-a2(c)(v) for the first time requires that the placement form advise the parent of a right to consult an attorney (A.A. "3").

[17](R-139 Jenkins, p. 22; A. pp. 69a, 73a.) Although in theory the content of the placement form is negotiable, Cf. S.S.L. §§384(2), 384-a in actuality the local Social Services districts used a standard placement form. Social Services Law §384(2), the governing statute when this action was commenced, did not prescribe the content of the form. At that time, parents who had children in foster homes for one year had signed forms such as that executed by Appellant Naomi Rodriguez (A. pp. 63a-64a).

failed to initiate such a proceeding, the child would remain in foster care.[18]

This procedure was superseded by the enactment of Social Services Law §384-a in 1975. S.S.L. §384-a permits specific terms for the return of a child to be stated in the placement form. When those terms are met, or when no terms are specified, and the parent requests the return of the child, the child must be returned unless, within 10 days of the request the local Commissioner having custody of the child secures a Court order prohibiting the child's return.[19]

In its present form, S.S.L. §392 mandates authorized agencies to submit to judicial review in Family Court the case of every child in voluntary foster care (or legally free for adoption), who has been in foster care for 18 months. (Prior to 1975, the time for the initial

[18]Many parents however had no knowledge of this legal remedy. Appellant Naomi Rodriguez, for instance, did not become aware that a remedy existed for approximately ten months. See Weiss and Chase, *The Case for Repeal of Section 383 of the New York Social Services Law*, 4 Columbia Human Rights Law Review, 326 (1972).

[19]The Court order may be secured in a child neglect proceeding (F.C.A. Article 10), in a proceeding to terminate parental rights (S.S.L. §384-b), in a foster care review proceeding. Additionally the agency may rely on a prior Court order denying a parent's custody petition. (F.C.A. Article 6). The procedure to be followed by parents and agency when parents request the return of their child to them must now be set forth in the placement form. A placement pursuant to S.S.L. §384-a is not a "remand or commitment" under S.S.L. §383(1); similarly approval of the placement pursuant to S.S.L. 358-a is not a "remand or commitment." S.S.L. §358-a was enacted in 1973 as a way of qualifying voluntary placements for federal aid pursuant to 42 U.S.C.A. 608-a. This is a "rubber stamping" procedure of which parents waive notice when they sign the placement form. *Children of the State I Preliminary Report of the Temporary State Commission on Child Welfare*, New York, New York 1975, p. 33.

review was 24 months). The child's parents, the foster parents and agency or agencies are parties to the proceeding. Foster parents may initiate the proceeding, and, may press for termination of parental rights. Indigent parents and foster parents have a right to assigned counsel F.C.A. §262. The child may, and usually has, a law guardian assigned in contested proceedings (F.C.A. §249). The Court, after hearing, may order that the child return home, that the child continue in foster care, or that proceedings be initiated to terminate parental rights, pursuant to 384-b, F.C.A. §611, so that the child can be placed for adoption; a child already available for adoption may be ordered placed in an adoptive home.[20] There must be another judicial review 24 months after the first one. However, following the first foster care review, the Family Court has continuing jurisdiction to monitor its disposition of the case, and may hold hearings at any time on its own motion or on the application of any party to the proceeding at any time before the next 24 month period arrives, S.S.L. §392(10).

Rights for foster parents have been recognized, not only through S.S.L. §392 but through the creation for foster parents of an adoption priority and a right of intervention in custody proceedings, S.S.L. §383(3), after a child has lived in a foster home for two years. However, the legislature has not limited the length of time a child may remain in foster care and be returned home with the agencies' consent.

[20]If the order is for the child to continue in foster care, various orders relating to the circumstances under which a child will continue in foster care may be made by the Family Court. For example, provision may be made concerning visitation; the Court may provide that a child remain in a particular foster home (A.A. "11") or may order that services be provided to the parents to strengthen and support the parent-child relationship, S.S.L. 392(9).

Obligations are also imposed upon the parents. Pursuant to S.S.L. §384-b, F.C.A. §611, parental rights may be terminated under a variety of conditions after a child is in foster care. Failure of the parent to visit the child, or to plan for its future, though able to do so, over a one-year period, is a ground for termination of parental rights, S.S.L. §384-b(4)(d). The mental illness or mental retardation of the parents may, under specified circumstances, also result in termination, S.S.L. 384-b(4)(c). Insubstantial visits cannot defeat termination, S.S.L. §384-b(7)(b). However, the initiation of a proceeding to terminate parental rights is left to the discretion of the public child care agencies until the S.S.L. §392 foster care review proceeding is held; then the Family Court may order that such proceedings be instituted.

The Claims of the Parties and Their Disposition Below

Plaintiffs-Appellees in this action are individual foster parents who, for a stipend, pursuant to state license and contract[21] with a public child care agency, board children in their homes, and an organization of such foster parents. They sued on their own behalf and on behalf of individual foster children, as a class, defining the claims of both as arising after a foster child has resided in a foster home for "a year or more". The foster parents claimed that at the expiration of that time period they acquired a "protected interest" under state law and/or a "liberty" interest under the Fourteenth Amendment of the Constitution, entitling them to continue to care for such foster children.

[21]The provisions governing licensing of foster parents in New York are S.S.L. §§375 through 382, 385-386, and 18 N.Y.C.R.R. 7.5.

On that basis, the foster parents claimed that S.S.L. §§383(2) and 400 and 18 N.Y.C.R.R. 450.10 and the actual practices of the public child care agencies were unconstitutional, because they permitted children to be moved out of foster homes to be either returned home to their parents or transferred to another placement without affording foster parents due process in the form of a prior administrative hearing.

The foster children were also alleged to possess a "liberty" interest in their relationship to the foster parents which similarly entitled the children to notice and a hearing before they could be removed from a foster home in which they had resided for "a year or more".[22]

The position advanced on behalf of the children in the foster parents' complaint was subsequently reversed by their independent Court-appointed counsel. Specifically, she opposed the requested hearing requirement.

Appellants-Intervenors are a class of natural parents of children voluntarily placed in foster care. They contended that although parents do not relinquish their constitutional and state law rights as parents by voluntarily placing their children in foster care, the relief requested by Plaintiffs and granted by the district Court would impair and diminish their familial rights and create barriers to the return of their children to them.

The district Court found that the foster parents had no entitlement under state law to the continued care of particular foster children and declined to reach the question of whether the foster parents had a fundamental "liberty interest" in the continued care of foster children who had been placed with them for "a year or more". However, the district Court determined that

[22]A. pp. 28a-36a.

foster children in the designated class did have a right cognizable under the Fourteenth Amendment to a prior "hearing at which all concerned parties may present any relevant information to the administrative decision maker charged with determining the future placement of the child".

In this context, the district Court refused to distinguish between those situations in which a child is being moved back to the home of his or her parents and those in which the move is to another foster home or institution. The Court held that in both situations the mandated hearing would perform a "salutary" information-gathering function. Further, the Court held that, since foster children do not have the capacity to exercise their hearing rights independently, a hearing would be required for *every* child about to be removed from a foster home in which he or she has resided for "a year or more". The Court left undisturbed the aspect of the statutory scheme which provided for a hearing both prior to and subsequent to the child's removal, pursuant to S.S.L. §400 and 18 N.Y.C.R.R. 450.10.

The Court's order adjudged New York Social Services Law §§383(2) and 400 and 18 N.Y.C.R.R. 450.10, as presently applied, to be unconstitutional, and enjoined the Defendant agencies from removing or authorizing the removal of any foster children in the certified class from foster homes in which they have lived continuously for more than one year without notice and hearing, at which the foster parents, the foster child and the biological parents may present any relevant information to the administrative decision maker charged with determining the advisability of such removal. At these hearings, the Defendants were ordered to appoint a disinterested adult to represent the child "whenever the Defendants, in their informed

discretion", determine that the child's age, sophistication and ability to communicate effectively his or her own true feelings warrant an appointment. The Court further stated that hearings need not be held in emergency situations where the health or welfare of the foster child is imminently threatened. The Defendants were ordered to promulgate and publish appropriate and consistent procedures.

Parents, children and New York State and City Defendants have appealed to this Court.[23] Plaintiff foster parents have not appealed.

In the Argument that follows Appellants Rodriguez, et al., parents of children voluntarily placed in foster care, are concerned with securing reversal of so much of the Order and Judgment of the District Court as deprives public child care agencies of the power to consent to the return of children to their parents and deprives the parents of the right to have the children returned to them with the agencies' consent. However, some of the questions presented necessarily involve the merits of the Order and Judgment as a whole.

SUMMARY OF ARGUMENT

POINT I

This class action was commenced with a claim for relief asserted by foster parents on their own behalf and on behalf of children in their care. The District Court, noting conflict of interests between these parties and inadequacy of representation, assigned separate counsel for the children. Counsel for the children aligned the children's claims with Defendants and asserted that the

[23] A.J.S. "D" pp. 39a-41a.

relief originally sought by foster parents for the children was harmful to them. The Court nevertheless granted the relief to the children, while still maintaining that there was conflict between the interests of foster parents and children. In the absence of claimed injury by the children's representative, relief was granted without a case or controversy under Article III §2 of the Constitution. The foster parents lacked standing to assert the children's interests since the Court expressly disqualified them from doing so. The district Court should not have adjudicated with respect to the rights of children under these circumstances.

POINT II

A.

Children who are returning home to their natural parents from foster care are not suffering grievous loss, as the District Court suggested. Grievous loss has been held by this Court to characterize unrelieved deprivation. The Court below identified as possible grievous loss the separation of foster children from the familiar environment of the foster home. This finding was based on two factors: the Court's acceptance of the Plaintiff's controversial psychological parent theory, i.e., that separation from the foster home after a year was likely to be separation from the most important relationship in the child's life, and on an erroneous interpretation of S.S.L. §400(2) and 18 N.Y.C.R.R. 450.10 which the Court feared would subject the child to the possibility of repeated placements. That the Court's interpretation of §400(2) is erroneous is clear, when it is considered in the entire context of New York law. That the Plaintiff's underlying theory is controversial and not

even supportive of Plaintiff's own claim of one year as the turning point in the child's relationship is clear from the testimony in the Court below. Given the ambiguity of the proof, and given the evidence of the continued strength of the parental relationship despite foster care, the District Court's application of the concept of grievous loss to the reunion of parent and child flies in the face of this Court's repeated pronouncements concerning the "fundamental" and "important" family relationship between parent and child. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

B.

1. Parents who voluntarily place their children in foster care do not thereby relinquish constitutional and state law parental rights. Parents voluntarily place their children in foster care assuming that the state is acting in good faith when it promises to return their children. Principles of fundamental fairness which must govern the dealings of the state and its citizens require that the state's undertakings have a binding quality. The condition for such consensual and benign state intervention must be that the state respects the right of both parent and child to family integrity. Otherwise, voluntary foster care would be taking of children by the State in the guise of benevolence. The District Court's requirement of a hearing before a child can return home is in irreconcilable conflict with the underlying premise of voluntary placement. A parent who voluntarily places a child in foster care is presumed fit; the district Court by subjecting parents to hearings before children can return home has presumed them to be unfit.

2-4. The importance of the natural parent-child relationship in our society has long been recognized by this Court. *Meyer v. Nebraska*, 262 U.S. 390 (1923). The rights of parents and their children in voluntary foster care exist within the framework of the constitutionally protected family unit. Parents have a right to the association and custody of their children. Similarly, children have a right to the association and care of their parents. Concomitantly, persons other than parents have no right to interfere with the parent-child relationship when the parent has not been declared unfit, *Stanley v. Illinois*, 405 U.S. 645. This Court has recognized that children as well as parents have a substantial interest in the family relationship. Children who are returning home to their parents from foster care are returning to the constitutionally protected family unit. The conclusion of the District Court that the State must provide hearings before allowing a child in foster care to return to his parents sharply divorces the interests of the child from that of the family unit at an arbitrary time point of one year, when state legislature has drawn time lines rationally. This separation is not justified by the evidence and is not supported by law.

C.

The District Court's hearing requirement imposes a real and substantial impediment to the reunion of children with their parents. The Court's statement of the contrary is incorrect. It not only ignores the emotional burden imposed by forced participation in litigation but also ignores the lengthy nature of custody proceedings and the inherent indeterminancy of custody decisions. In addition, it ignores the special burdens

which litigation imposes on the typically poor and impoverished natural parent, and thereby the parent-child relationship. It is the District Court which confuses the process by which the decision to return children is made and the standard used for that decision.

D.

Children are not arbitrarily returned to their parents, as the district Court suggests. Child care agencies have extensive information concerning children in their care and their natural and foster parents. An agency decision to return a child home is a slow and deliberate process. There is little risk of carelessness in decision-making, because of the broad New York child protective laws. If anything, agencies tend to err in the direction of keeping children in foster care too long. The district Court's concern was unjustified. There are existing legal procedures available to foster parents to provide prior judicial review of an agency determination to return a child home. Plaintiffs-Appellees could have obtained the relief sought in this Court in the context of the S.S.L. §392 proceedings which were pending as to all of them at the time this action was commenced.

E.

There is no evidence in the records to suggest that the time periods selected by the legislature for recognizing the interests of the foster parents in relation to foster children are irrational or unreasonable. The district Court's holding that prior hearings are required when children have been in foster care for exactly one year or more has no basis.

POINT III

The claims of the children named as parties in the instant action were in foster care for four years or more and had no contact with their parents for a year. Their claims were not typical of the claims of the class certified–all children who had lived in a foster home for one year, regardless of the child's ongoing relationship to his own parents, and the named children could not adequately represent the rest of the class. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974). Many members of the class have interests antagonistic to those of the named children. The class is unascertainable.

POINT IV

The Court below erred in failing to permit the natural parents to raise and prove their defense to this action. In permitting them to intervene, the Court recognized the natural parents have an interest in the instant matter. Once they had intervened, they had the right to present evidence as to their interest and to raise and prove any defense they might have had to the action. *Stewart-Warner Corporation v. Westinghouse Electric Corporation*, 325 F.2d 822, (2d Cir. 1963), cert. den. 376 U.S. 944 (1964).

They were not permitted to show that the hearings ordered by the Court below do not protect the children and are severely detrimental to the family. The Court's refusal to hear any evidence from the natural parents was so serious as to amount to a denial of due process of law. *Lindsay v. Normet*, 405 U.S. 56, 66 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970).

ARGUMENT

I.

THE DISTRICT COURT ERRED WHEN IT ADJUDICATED WITH RESPECT TO THE RIGHTS OF CHILDREN SINCE THERE WAS NO CASE OR CONTROVERSY WITH RESPECT TO THOSE RIGHTS AS REQUIRED BY III, §2 OF THE CONSTITUTION AND FOSTER PARENTS WERE DISQUALIFIED FROM ASSERTING THE CHILDREN'S CLAIMS.

This action was originally commenced by O.F.F.E.R. and the individual named foster parents both on their own behalf and that of the foster children in their care and contained identical claims for both sets of parties. In response to a claim of conflict of interest between the foster parents and the children, Helen Buttenwieser, Esq. was appointed as independent counsel for the children by District Court Judge Carter on October 25, 1974.

The Answer filed on behalf of the children by Ms. Buttenwieser denied seriatim each and every allegation of unconstitutionality contained in the Second Amended Complaint, whether advanced with respect to foster parents or children, and alleged in Paragraph 8 that the interests of the children "would be vitally and adversely affected" by the granting of the relief prayed for in that complaint.[24]

Thus, the court-appointed counsel for the children argued that while the statutes and regulations challenged by the foster parents were not harmful to the

[24] Appellants' Joint Appendix to Jurisdictional Statements (hereinafter A.J.S.) Appendix "H", p. 70a.

children, the hearing procedures sought by the foster parents would be.[25]

At the trial counsel for the children presented witnesses in support of her position.[26]

Despite Ms. Buttenwieser's insistence that the children were adequately protected by existing procedures, the District Court found those procedures constitutionally insufficient. The District Court thus granted the children relief which they had neither requested nor wanted. As Judge Pollack noted in his dissent, "The Court's opinion anticipates a question of constitutional law in advance of the necessity of deciding it."[27] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936). There was no case or controversy here in the most literal sense. The children, by their Court-appointed representative, did not seek the relief which was granted to them. They claimed that they were not injured by the state Statutes and Regulation challenged by foster parents. There was no controversy between the children and the several defendants. In *Flast v. Cohen*, 392 U.S. 83 (1968), this Court stated that the "case" and "controversy" requirement contained in Article III of the Constitution "limits the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." 392 U.S. at 95. With respect to the rights and interests of children determined by the District Court, not only was there

[25]She did take the position that if hearing sought by the foster parents were mandated that the children should be represented at the hearings.

[26]Florence Creech, Director, Louise Wise Children's Services, T48-90; Jane Edwards, Director, Spence Chapin Services to Families and Children, T91-123.

[27]A.J.S. Appendix "B", p. 27a.

not "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions" *Baker v. Carr*, 369 U.S. 186, 204, (1962) cited in *O'Shea v. Littleton*, 414 U.S. 488 at 494 (1974), there was no adverseness at all. As Judge Pollack noted in his dissent, "The position of the children taken by the Court is espoused only by the foster parents who have no standing to assert the children's interest,"[28] citing *United States v. Raines*, 362 U.S. 17, 21-22 (1960); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943); *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972); *Barrows v. Jackson*, 346 U.S. 249 (1953), for expression of the general rule that one person does not have standing to assert the constitutional rights of another. This Court addressed this issue recently in *Singleton v. Wulff*, ___ U.S. ___, 96 S. Ct. 2868 (July 1, 1976). There the Court discussed the rationale for the general rule and also recognition of exceptions to the rule. The Court's opinion makes clear that exceptions are to be considered only when the third person is not a party to the litigation. Here, the children are parties and have been provided with independent counsel; representation of the children's interest has been held to satisfy the requirements of Rule 23(a)(4) of the Federal Rules of Civil Procedure and has been praised by the Court.[29] The claims of the children and of the foster parents were severed by the District Court because of potential conflict of interest and because the Court found that, based on the pleadings filed, counsel for the foster parents could not adequately represent the interests of the children.[30]

[28]A.J.S. Appendix "B", p. 27a.

[29]A.J.S. Appendix "E", p. 47a.

[30]A.J.S. Appendix "G", pp. 62a, 64a.

Under these circumstances the foster parents cannot have standing to assert the children's rights over the opposition of the children's counsel. The Majority's insistence in its opinion on the disparity between the interests of the children and the foster parents only underscores this fact.

The provisions of the Order and Judgment of the District Court highlight the internal inconsistency of the Court's handling of this issue. The majority opinion rests solely on a child's constitutional right to a hearing before being moved. It explicitly rejects the foster parents' argument that they have a protected interest in the child. Yet the Order and Judgment dispenses with the mandated hearing if the foster parent requests that the child be moved elsewhere.[31] Further, independent representation of the child at the hearing is discretionary and need to provided only when "the child's age, sophistication and ability effectively to communicate his or her own true feelings warrant such an appointment."[32] The anomaly of this result was well articulated by Judge Pollack in his dissent:

> The Court's recognition of some interest in the child other than that asserted by their independent representative herein betrays a significant confusion over the question of when a child does and does not require independent representation under the Due Process Clause. Apparently a child requires an independent representative in the hearing required by the Court despite the views of the children's independent representative in the hearing of this action.
>
> In short, allowing foster parents standing here to assert the interest of the child seriously undermines the Court's later finding that the child

[31] A.J.S. Appendix "C", p. 37a.

[32] A.J.S. Appendix "C", p. 37a.

> requires representation independent of the foster parents at a due process hearing.[33]

The Complaint should have been dismissed.

II.

THE COURT BELOW ERRED IN REQUIRING A HEARING BEFORE CHILDREN ARE RETURNED TO THEIR NATURAL PARENTS.

> My mommy's sick so how can she take care of us? When she gets better she's gonna take us and we'll never come back. (p. 50).
>
> It's like a home, but not a real home. (p. 31).
>
> There was the Johnsons and the Hammonds and the Roberts and the Bookers . . . and the Bookers . . . . Well, the Johnsons she had a baby, and the Hammonds he didn't like a lot of noise, and I guess the Roberts didn't like me too well, and the Bookers, I guess they couldn't stand it either, so they took me here. (p. 34)[34]

A. A hearing is not required because children who are returning to their natural parents are not suffering grievous loss.

The District Court held that foster children as "persons" within the meaning of the Fourteenth Amendment have a right to be heard before being "condemned to suffer grievous loss" before going home

[33] A.J.S. Appendix "B", p. 34a.

[34] Interviews with foster children quoted in Weinstein, *The Self Image of the Foster Child*, Russell Sage Foundation, New York, 1960.

om foster care, citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring)[35]

The evaluation as to whether a "grievous loss" affecting the weight of an individual interest has occurred is ordinarily made only after it has been determined that an asserted interest is constitutional in nature. *Goldberg v. Kelly*, 397 U.S. 254, 261-263 (1969); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). However, because the characterization is so extreme, it must be rejected at the outset. "Grievous loss" has no application to the return of children in foster care home to their parents.

The term "grievous loss" has been used by this Court to characterize unrelieved deprivation. In *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), it was public stigmatization with consequent inability to retain or obtain public employment; in *Goldberg v. Kelly*, 397 U.S. 204 (1970), it was the "brutal need" of the destitute welfare recipient; in *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Wolff v. McDonnell*, 418 U.S. 539 (1974), it was return to prison and a longer stay in prison.

In this action, the Court below identified as possible "grievous loss" to foster children returning home to their parents the "separation from a familiar environment" i.e., the foster home. By focusing exclusively on the child's relationship to the foster home and ignoring the child's relationship to his own home, the District Court transformed "that usually glorious occasion when he goes to his own parents . . . a time of rejoicing, that the family is reunited" into a traumatic experience.[36]

[35] A.J.S. p. 10a.

[36] A. Fanshel, p. 180a.

The foster parents' argument, that foster children need due process protection when child care agencies *agree* that the children can return home to their parents, was based on two premises. One was that in a matter of months[37] after a child leaves its own home and goes to live in a foster home the child may regard the foster parents as his true "psychological parents", possibly to the exclusion of his or her own parents. Therefore, the foster parents' experts view a child's separation from the foster home when he has lived for a time as a potentially painful and important event. In case of conflict over the child's custody between parents and foster parents the foster parents' experts considered the child's relationship to foster parents as the most important, unless and until the conflict is resolved against the foster parents.[38]

Secondly, in bringing this action, the foster parents interpreted Social Services Law §383(2) and 400(2) and 18 N.Y.C.R.R. 450.10 as creating such a conflict between themselves and the public child care agencies. Parents of children in foster care intervened in this action on the ground that such a conflict was sought to be created with them by the foster parents in derogation of their recognized familial rights, *Meyer v. Nebraska*, 262 U.S. 390 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Yoder v. Wisconsin*, 406 U.S. 205 (1972).

The District Court's finding of "grievous loss" as applied to the return of children from foster care home to their parents was based on two major misconceptions. First, it uncritically accepted the highly

[37] A. Goldstein, p. 195a.

[38] A. Solnit, pp. 224a, 233a; Goldstein, pp. 194a-195a.

controversial[39] view that after one year in a foster home—an entirely arbitrary time figure[40] separation from the foster home was likely to be separation from the most important relationship in the child's life. Second, the District Court erroneously believed that the interplay of 18 N.Y.C.R.R. §450.10 and Social Services Law §400(2) permitted a child to be returned home to his parents after the §450.10 administrative procedure,

[39]The foster parents relied on *Beyond the Best Interest of the Child*, by Goldstein, Freud and Solnit. An earlier version of the point of view developed in that book was presented in *Note, Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 Yale L.J. 151 (1963). Both have been severely criticized by thoughtful commentators: "Psychological parenthood is an ambiguous concept, the criteria for which are not clearly established and which are . . . difficult to define clearly." Kadushin, Alfred, *Beyond the Best Interests of the Child: An Essay Review*, 48 Social Services Review No. 4, December, 1974, 508, 512; "the proposal is unworkable . . . it is simply untrue that the behavioral sciences have as yet developed the expertness to make judgments about children and their parents that the scheme requires. Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication*, 4 Law and Society Review 167 (1969). See also Katkin, Bullington & Levinge, *Above and Beyond the Best Interest of the Child: An Inquiry Into the Relationship Between Social Science and Social Action*, 8 Law and Society Review 669 (1974) and Strauss & Strauss, *Beyond the Best Interest of the Child*, 74 Columbia Law Review 996 (1974).

This Court has taken note of "the uncertainty of diagnosis" and the "tentativeness of professional judgment" in psychiatry, *O'Connor v. Donaldson*, 422 U.S. 563, 584, 45 L.Ed.2d 396, 412, citing Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Calif. Law Review 693 (1974). See also the devastating critique of psychoanalysis by Nagel, *Methodological Issues in Psychoanalytic Theory, in Psychoanalysis Scientific Methods and Philosophy*, New York University Press, 1965, page 38. A. Chess, p. 130a.

[40]A. Fanshel, p. 177a; Goldstein, p. 200a.

only to be moved again if a second S.S.L. §400(2) administrative decision reversed the first,[41] and thus subjected the child to harm from repeated replacement. However, as will be shown, the holding of "fair hearings" in cases where children are being returned to their parents is contrary to New York law, including the Constitution of the State of New York.

Eminent scholars in the field of foster care as well as family psychiatry, some of whom testified on behalf of Appellants parents,[42] have disputed virtually every aspect of the theory on which the foster parents' claims rest.[43] The theory is derived from unrepresentative

[41]A.J.S. 12a, 13a.

[42]Parents presented the testimony of Professor David Fanshel, Professor Eugene Weinstein, Professor Shirley Jenkins, Dr. Henry Grunebaum and Dr. Joel Kovel.

[43]Dr. Henry Grunebaum testified that:

> "Goldstein . . . draws conclusions . . . on the basis of psycho-analytical theory and psycho-analytical theory is only one of the ways we have of understanding children and their development today; and the evidence from psychoanalytical theory is largely gathered from the study of psychoanalysis.
>
> It ignores the considerations of child psychology, and it ignores the considerations of family research and family therapists. I think it ignores common sense in fact; that there are too many every day examples of children having strong attachments to a father who has gone away to the Army to believe that a child has only one attachment and that one attachment is all-important." (A. Grunebaum, p. 255a.)
>
> "[T]here is no such thing as the psychological parent . . . there are a variety of significant and central attachments in people's lives, out of which they form an identity. . . . I do not believe the Professor Goldstein, whom I have discussed these matters with, can cite any evidence for his point of view; that it is a matter of personal opinion." (A. Grunebaum, p. 258a.)

clinical experience,[44] from custody cases involving extreme facts,[45] relies heavily on studies of a few infants[46] and studies drawn from "pathological" and "catastrophic" settings.[47] While advanced as a basis for resolving and minimizing custody disputes, the theory in fact generates and exacerbates conflict over children in a way that is harmful rather than beneficial to them.[48]

[44]A. Fanshel, p. 173a; Goldstein, pp. 192a, 200a; Solnit, pp. 211a-213a.

[45]Strauss & Strauss, Beyond the Best Interest of the Child, 74 Columbia Law Review 996 (1974) at 1006.

[46]A. Goldstein, pp. 200(a), 207(a).

[47]R-90, Kovel, p. 27.

[48]Thus, Professor Eugene Weinstein testified:

". . . situations will be set up . . . which will set up barriers for return of the child to its natural parents, and also create a situation in which the foster parents now have an investment in trying to make permanent the relationship, where before they were simply provided a contractual service." (R-91, Weinstein, p. 30.)

"It also is likely to lead to an increase in long-term foster care which is not a good situation for children . . . [b]ecause it perpetuates what is essentially an ambiguous situation and one in which there is not protection for another kind of right, that is, a long-term foster placement can be terminated at the will of the foster parents.

This is not the case for natural or easily the case for natural or adoptive parenthood, so that the ordinary protection of adoption and natural parents are not available to a child in long-term foster care. It is an ambiguous situation . . . which is apt to have deleterious consequences." (A. Weinstein, pp. 111a-112a.)

See also Strauss & Strauss, *op. cit.*, 74 Columbia Law Review 966 at 1007.

1. Children in foster care continue to regard their relationship to their own parents as primary.

The District Court's application of the concept of "grievous loss" to the reunion of children and their parents flies in the face of deeply held and cherished beliefs that the relationship between parents and children is "enduring and important," *Stanley v. Illinois*, 405 U.S. 645 at 652 (1972) and that "the familial relationship between parent and child is fundamental to our civilization," *Mattis v. Schnarr*, 502 F.2d 588 at 594 (8th Cir. 1974); *Spence-Chapin Adoption Service v. Polk*, 29 N.Y. 2d 196 (1971). Empirical studies representative of children in foster care, as well as psychiatric opinion attest to the continued validity of those beliefs as applied to the relationship of the parents and children in foster care whom public child care agencies *agree* to reunite with one another.

Children in foster care continue to identify with and be strongly attached to their parents for long periods of time. Both Professor Eugene Weinstein, author of *The Self-Image of the Foster Child*, and Professor David Fanshel, each independently studied and interviewed children who had been in foster care and in foster homes for from one to five years.[49]

[49]Weinstein, *The Self-Image of the Foster Child*, Russell Sage Foundation, New York 1960.

Each study included children who were placed in foster care when they were between two and three years old.

Professor Weinstein studied 61 children each of whom had been in foster care for from one to five years; the children interviewed were five years old and up. (A. Weinstein, pp. 107a, 112a.)

Professor Fanshel's sample was 624 children. He interviewed children 5 years and older after two and a half years in foster care as part of the larger study. (A. Fanshel, Table 9, p. 189a.)

Professor Weinstein found that foster children who were visited by their parents even as infrequently as twice a year[50] continued to be emotionally identified with their parents until they had spend at least half their life time in foster care.[51] Moreover, the best adjusted among the children were those who identified with their parents.[52] Similarly in Professor Fanshel's study, interviews with children after they had been in foster care for two and a half years showed "in overwhelming good measure that the children had positive emotional attachments to their own parents . . . what came through to me on the basis of reading of all of those interviews was the meaning of one's family to a child."[53] Professor Fanshel concluded that "if the child has been visited by his parents,[54] he's able to maintain his attachment to them and therefore removal

[50]In the study regular visiting was defined as twice a year or more. See Table 2, page 54, Weinstein, *Self-Image of the Foster Child*. R-91 Weinstein, Exhibit A.

[51]A. Weinstein, p. 108a.

[52]A. Weinstein, p. 108a.

[53]A. Fanshel, pp. 180a-181a.

[54]Mrs. Creech, director of Louise Wise Childrens Services testified that "generally there are regular visits when there is a definite plane toward reuniting the child with the family," and that even where there had been a period of time when there was no contact between parent and child, as where the mother was hospitalized, typically the agency would arrange for a period of visiting before a child was returned home. (A. Creech, p. 286a.)

Mrs. Edwards, Director of Spence-Chapin Services for Children and Families testified that prior to returning a child home "in most situations it would be that the parents have been visiting" (R. 84, p. 118).

Ms. Mary Jane Brennan, Director of the Nassau County Children's Bureau testified that when children are returned to their parents "it would be very unlikely that there would have been no contact." (A. Brennan, p. 137a.)

from the foster home need not be the critical issue, they are a secondary source of parenthood for him."[55] While a child "may have an instantaneous reaction to the separation from what he's gotten accustomed to"[56] he also gains from his reunion with his parents and therefore the experience is "better for the child to go through."[57] Dr. John Bowlby, an international authority on these problems has written:

> studies confirm what is already known about children, namely that they are not slates from which the past can be rubbed by a duster or sponge, but human beings who carry their previous experiences with them and whose behavior in the present is profoundly affected by what has gone before. It confirms too the deep emotional significance of the parent-child tie, which though it can be greatly distorted, is not to be got rid of by physical separation. . . .
>
> . . . However good the foster mother or house mother, the child will regard her as more or less a poor makeshift for his own.[58]

Thus the District Court's application of the term "grievous loss" to the experience of children returning

[55]A. Fanshel, p. 175a.

[56]A. Fanshel, p. 175a.

[57]A. Grunebaum, p. 260a. See discussion of aftermath of *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152 (1966) *cert denied* 385 U.S. 949, a case decided on the "psychological parent theory" in *Strauss & Strauss, op cit.* 74 Columbia Law Review 996 (1974) at 1006. See also *In re Zwiebel*, 79 Misc. 2d 795 (Family Court Nassau County, 1974), for description of a little boy's speedy and successful adjustment upon returning home after a long period of foster care.

[58]Bowlby, John, *Child Care and the Growth of Love*, Penguin Books, 2nd Ed. pp. 137-138 (1953).

home from foster care after one year was completely insensitive to foster children's positive and tenacious identification with their natural parents.

The decision of the District Court was also based on a highly romanticized version of the life of a child in foster home care. A more realistic view was recently presented by Professor Wald in the Stanford Law Review:

> It is now the prevailing ethic among child care experts that foster care has been overused.... [T]here is a substantial body of clinical findings identifying harms associated with foster care.... [C]hildren often view foster home placement as a punishment for something they did wrong. In addition the child [in foster care] may be confronted with three sets of adults [natural parents, foster parents, social worker], all of whom have some stake in caring for him and planning for his future. In the absence of clearly structured role expectations, both power and responsibility may sometimes be shared, sometimes competed for, and sometimes denied by one or more of the three. As a result children placed in foster care homes often experience identity problems, conflicts of loyalty, and anxiety about the future....
>
> The quality of foster parent homes also varies considerably. While some are warm and nurturing, there are also reports of children being physically abused or mistreated by foster parents. Moreover, children in foster care are frequently subjected to multiple placements.[59]

While focusing on agency decisions to move children, when it protected children's foster status, the District

[59]Wald, Michael S., State Intervention on Behalf of "Neglected" Children, 28 Stanford Law Review, No. 4, p. 623, pp. 644-645 (1976). For the same point see also A. Fanshel, p. 164a.

Court disregarded the fact that many children are moved at the request of foster parents.[60]

The foster parents' own experts did not object to the return of children to their parents after one year of foster care, merely because of the passage of that period of time. Both Professor Goldstein and Dr. Solnit testified that their concern was with cases where there was a legal conflict about returning their child.[61] But New York law never recognized a right of foster parents to precipitate a legal conflict about the return of children to their parents after one year of foster care. That conflict was created by the claims of the foster parents in this action and magnified by the decision of the District Court. With respect to children like those named as parties to the action, all of whom had been in foster care for at least four years, adequate procedures for the assertion of legal claims by foster parents to their custody already existed in New York law.

2. Social Services Law §400(2) does not apply when children are returned home to their parents; therefore, there is no risk of "grievous loss" as a result of its application.

Foster parents also claimed that removing a child from the foster home only to then return him to the same foster home after a post-removal administrative hearing, subjected children to harm from being moved repeatedly. This argument is based on an interpretation of S.S.L. §400(2) unsupported by any settled state

[60]A. Parry, p. 90a; Brennan, p. 133a; R-48, Affidavit of O'Malley.

[61]A. Goldstein, pp. 203a-204a; Solnit, pp. 210a-211a.

court interpretation of that statute. Analysis of S.S.L. §400(2) in relation to other state statutes and case law strongly indicates that S.S.L. §400(2) was never intended to apply in cases where children were being returned home to their parents; and that the application of S.S.L. §400(2) to that situation conflicts with state law, including the Constitution of the State of New York.[62]

S.S.L. §383(2) expressly states that custody of a child placed out or boarded out is only vested in the authorized agency until the child is "discharged," (Appendix "1" to this Brief). Therefore, when an agency returns a child to his parents, it loses custody of the child. Absent a new voluntary placement agreement pursuant to S.S.L. §384-a, or a court order in a neglect proceeding, under Family Court Act, Article 10, the agency cannot regain custody Cf. *Spence-Chapin Adoption Service v. Polk*, 29 N.Y.2d 196, 199 (1971). Thus, any determination in favor of the foster parent in a S.S.L. §400 fair hearing could not be enforced because an agency lacks the power to retrieve a child who was returned home. This conclusion is reinforced by the fact that S.S.L. §400(2) does not provide for the natural parents to be informed of or to participate in the hearings it establishes, but a decision in such a

[62]Compare *Matter of W.*, 77 Misc.2d 374, 355 N.Y.S.2d 245 (Family Court, New York County, 1974), *Matter of Dionisio R.*, 366 N.Y.S.2d 280 (Family Court, New York County, 1975), *In re Custody of Mack*, 81 Misc.2d 802, 367 N.Y.S.2d 644 (Family Court, Queens County, 1975). Appellants Rodriguez et al. had urged the District Court to abstain if there was any doubt about the inapplicability of §400(2) hearings when children returned home, on the ground that it would substantially modify the constitutional issue [*Harris County Commissioners Court v. Moore*, 420 U.S. 77, 83, 84, 43 L.Ed.2d 32, 39, 40 (1975); *Bellotti v. Baird*, ____ U.S. ____, 49 L.Ed.2d 844, 855 (1976)].

case would then be useless because it would not bind the natural parents.[63]

Further, if Social Services Law §400(2) applied to returns home, the section would conflict with the voluntary placement statute, Social Services Law §384-a passed after S.S.L. §400(2). Section 384-a requires an agency to return a child within ten days of the parent's request or at the end of the period of time specified in the original agreement of placement; unless, within a 10-day period, the agency obtains a court order directing that the child not be returned, based on the parents' neglect or abandonment. If S.S.L. §400(2) applied to cases of children returning home, it would interfere with the agency's ability to comply with the requirement of Social Services Law §384-a.

Additionally, there would be a conflict with Social Services Law §392(7), passed after S.S.L. §400(2), which provides for periodic foster care review proceedings in the Family Court, in which the Court may order a child returned to his parents. If S.S.L. §400(2) applied, the Department of Social Services could be subject to conflicting orders. The absurd consequence

[63]The legislative history of S.S.L. §400(2) indicates that the law was passed in response to *In re St. John*, 51 Misc.2d 96, 272 N.Y.S.2d 817 (Fam. Ct. Ulster Co. 1966), *rev'd sub nom.; Fitzsimmons v. Liuni*, 26 App. Div.2d 980, 274 N.Y.S.2d 798 (3rd Dept. 1966), a case involving the attempts of a foster parent whose foster child had been moved to another foster home for purposes of adoption to have the child returned. Mr. Peter Mullaney, Assistant Counsel for the State Department of Social Services, testified that in one year, 1974-1975, there were approximately 12 to 20 §400 hearings requested and approximately 7 to 10 were actually held; some of these few apparently involved the children returned home (A. 142a-144a). There is, however, no recorded instance of a child being returned from its parents to foster care as a result of a S.S.L. §400(2) fair hearing.

of such an interpretation were illustrated by testimony of Peter Mullaney an Assistant Counsel to the State Department of Social Services, who testified that some S.S.L. §400(2) fair hearings had been held even where an order determining the child's custody or placement has previously been made in a S.S.L. §392 proceeding in the Family Court, or in a custody proceeding in the Supreme Court. Agreeing that the Commissioner of Social Services lacks the power to reverse a decision of a Judge of the New York Supreme Court or Family Court, he conceded that in those situations too, there was no authority for "a bona fide remedy for foster parents."[64] This clearly suggests that there is something wrong with the way the State Department of Social Services has interpreted and applied S.S.L. §400(2).

There are other anomalies as well, if S.S.L. §400(2) applies to situations where a child is returned home. For instance, S.S.L. §400(2) would be inconsistent with S.S.L. §383(3) which gives the foster parents the right to intervene in custody proceedings only after they have had a child for two years; S.S.L. §383(3) would be unnecessary if S.S.L. §400(2) applied to all children who are returned home at any time prior to the two years. S.S.L. §383(3) was enacted in response to a ruling by the New York Court of Appeals (*People ex rel Scarpetta v. Spence-Chapin Adoption Services*, 28 N.Y.2d 185, 21 N.Y.S.2d 65 (1971) *cert. denied*, sub. nom. *De Martino v. Scarpetta*, 404 U.S. 805) that foster parents could not intervene in custody proceedings affecting a foster child, as against the child's parents. The Legislature's subsequent creation of this right after two years by the passage of S.S.L. §383(3) suggests that the Legislature believed the foster parents could not contest the natural parents' right to custody

[64] A. Mullaney, p. 145a.

of a child at an earlier time. Cf. *People ex rel Anonymous v. Saratoga County Department of Public Welfare*, 30 A.D.2d 756 (3rd Dept. 1968).

Finally, if S.S.L. §400 applies to situations where children are returned home to their parents, the fair hearing becomes a custody proceeding[65] to be determined by the State Department of Social Services. But this Department does not have custody jurisdiction. That power is reserved to the Supreme Court and the Family Court by the New York State Constitution (New York State Constitution, Art. VI, §§7, 13(b) amended 1973); *Boone v. Wyman*, 295 F.Supp. 1143 (S.D.N.Y. 1969) *aff'd.* 412 F.2d 857 (2d Cir. 1970), *cert. denied*, 396 U.S. 1024 (1970). In New York, custody jurisdiction, as part of equity jurisdiction, is constitutional rather than merely statutory. See *Aberdeen Restaurant Corp. v. Gottfried*, 158 Misc. 785, 788 285 N.Y.S. 832, 835 (1935). In holding fair hearings pursuant to S.S.L. §400(2), when a child goes home, the State Commissioner of Social Services would be in excess of his power and in violation of the New York State Constitution.

Thus a careful analysis of the New York State statutory scheme makes it clear that until the decision of the District Court, the application of S.S.L. §400(2) never could result in the situation in which a child who was returned home by an agency would subsequently be returned to foster care after a S.S.L. §400(2) fair hearing decision. Therefore, when an agency agrees to return a child to his parents there can be no claim that a child will be harmed by repeated replacement. Consequently the question of whether there would be such harm need not be addressed and the concept of "grievous loss" does not come into play.

[65] The Commissioner would be deciding whether to relinquish custody by discharging the child pursuant to S.S.L. §383(2).

If S.S.L. §400(2) did in fact provide prior hearings to foster parents in each case where a child was returned home to his or her parents from foster care, the result would be a denial of due process of law to parents. That is also the effect of the decision of the District Court.

B. The hearings mandated by the District Court impermissibly infringe on the constitutionally protected family unit.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 409 U.S. 564, 569 (1972); *Matthews v. Eldridge*, 424 U.S. 319, ____, 47 L.Ed.2d 18, 31 (1976).

There were three private interests asserted in this action at the District Court level: those of foster parents, parents and children. The District Court did not find any interest asserted by foster parents for themselves to be constitutionally protected and the foster parents have not appealed. Therefore, only the interests of parents and children in their relation to one another and to the state are before the Court.[66] Before a proper assessment of those interests can be made, it is necessary to consider both the nature of the foster care system as a social arrangement and the nature of foster care placement as a form of state intervention. Cf. *Roe v. Wade*, 410 U.S. 113 (1973).

[66]However, plaintiffs will no doubt continue to assert the rights of foster parents even though they have not appealed, just as in the District Court they continue to assert the interests of children though disqualified from doing so.

1. The District Court ignored the nature of foster care placement.

The historical underpinnings of the foster care system can be found in the early practice of indenture of children.[67] The practice of binding out poor, orphan and illegitimate children was widespread in many states in the 18th Century and had its origins in English practice and law. It was considered to be the most economical kind of social provision for those children.[68] Poor parents as well as children were, in effect, both treated as chattels, their humanity and their family ties ignored because of their destitute state.

Not all poor children were indentured. Sometimes "outdoor relief" or material aid supplied to destitute parents in their own homes preserved a child's home. But outdoor relief was the less common form of care. Institutions such as almshouses, and later, special institutions for children, such as orphan asylums, were prevalent by the end of the 19th Century.[69]

The use of foster homes also began in the 19th Century.[70] Because of their closer approximation to the natural family setting, foster homes were thought to represent an improvement over prior systems.

Over the first half of this century, particularly under the impetus of studies which reported on the harmful

[67]Costin, Child Welfare: Policies and Practice 323 (1972); Mnookin, Foster Care–In Whose Best Interest? 43 Harvard Educational Review, 599, 603 (1973).

[68]Jenkins, Child Welfare as a Class System in Children and Decent People 7 (A. Schorr ed. Basic Books, New York 1974).

[69]Costin, Child Welfare: Policies and Practice 324, 325 (1972); Jenkins, Child Welfare as a Class System in Children and Decent People 8 (A. Schorr ed. 1974).

[70]Costin, Child Welfare: Policies and Practices 325 (1972).

effects of institutional care on children, foster home care became the predominant mode of substitute care provided by the state away from the child's own home.[71]

However, whereas the 19th century model of foster care originally developed by such figures as Charles Loring Brace was, like indenture, based on a complete severance of the child and his family,[72] in this century there has been a gradual recognition that complete severance of the child from his family is neither possible nor advisable for the child.[73] Accordingly, child welfare goals and practices were re-oriented to support the primacy of the family unit, even for families who require help in caring for their children from the state foster care system. This orientation underlies the concept of foster care today.

> The distinguishing aspect of foster care is that it is designed to be a temporary arrangement. The family is broken up only so that it can be put together again in a way that will be less problematic for the child.[74]

Both child and parent suffer from the separation from each other.[75] These personal losses are deemed

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[71] Jenkins, Child Welfare as a Class System in *Children and Decent People* 8 (A. Schorr, Basic Boods ed. 1974); Costin, Child Welfare: Policies and Practice 327 (1972).

[72] Costin, Child Welfare: Policies and Practice 325-6 (1972).

[73] J. Bowlby, Child Care and the Growth of Love 13-20 (1965); Wald, State Intervention on Behalf of "Neglected" Children: Standards of Removal of Children from their homes, Monitoring the Status of Children in Foster Care and Termination of Parental Rights, 28 Stan. Law Review 623, 644 fn. 99 (1976).

[74] Kadushin, Child Welfare Services 411 (1967).

[75] Jenkins and Norman, Filial Deprivation and Foster Care, Col. U. Press, N. Y. (1972). See also A. Jenkins, 102a-103a.

acceptable in view of the expectation that the family unit will be made whole again when the parent is ready to resume care for the child; reunion of the family requires however that the child be able to leave the foster home.

The role of the foster parent is not to replace the child's own parent, but rather to support the parent-child relationship.[76] Foster parents have been described as a special kind of people who "allow easy entrance and exit of children from their families." (A. Fanshel 167a). The operation of the foster care system depends on their possessing this quality, and the State must encourage acceptance of this role despite its inherent difficulties.

"[F]oster care is, in itself, an imperfect response to family disaster and social neglect".[77] It is a social system which brings the most sensitive and vulnerable emotions into play in "a complex network of

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[76] Professor David Fanshel described the foster care concept: ". . . The placement of a child in foster care is a very delicate social arrangement. It's a social mechanism for creating a balance in a situation that has gone askew. A child is in need of care. He's a member of a biological unit; and society intervenes on his behalf to assure him that he get the kind of consistent care that is required. . . . "But that arrangement is based on the notion that a beleagured parent who is succumbing to whatever forces are operating upon her in preventing her from functioning, can be assured that these services will be rendered on behalf of her children, and will also be assured that her parental rights will be respected. Therefore, the selection of people, and supportive work done by agencies is to help the foster parent understand the distinction between having their own child or having an adopted child and having an interim responsibility for someone else's child." (A. 162a.)

[77] The Children of the State I, The Preliminary Report of the Temporary State Commissioner on Child Welfare, New York, New York 1975, p. 22.

relationships."[78] This social system exists within a framework of "state action" cf. *Perez v. Sugarman*, 499 F.2d 761 (2d Cir. 1974). Voluntary foster care as provided by the State of New York occurs only at the request of or with the agreement of the child's parent, S.S.L. §§395, 398, 384(a). As such it is a *benign* form of state intervention in the parent-child relationship.

Parents have consented to state intervention in the lives of their families on the assumption that the state was acting in good faith when it offered foster care as a help and service to them, and when it promised to return their children when help and services were no longer required. (A. Rodriguez 68a-72a, Jenkins 102a-104a).

Until the decision of the district Court, their reliance was well founded in New York law. Formal placement is with the local Commissioner of social services, who has legal power to return the children pursuant to Social Services Law §383(1), *Spence-Chapin Adoption Services v. Polk*, 29 N.Y.2nd 196 (1971). Social Services Law Section 384-a, enacted in 1975, makes return of the child mandatory in the absence of a Court order which prohibited such return.

Principles of fundamental fundamental fairness which must govern the dealings of the state and its citizens require that the state's undertaking have a binding quality. In contrast to *coercive* state intervention, as in the case of an adjudication of child neglect (F.C.A. Article 10), in the voluntary placement scheme the

[78]"Foster care is a complex network of relationships. The child, the agency, foster parents, biological parents, and that these relationships are interconnected so that what occurs in one pair in the set has reverberations for other relationships in the network, what occurs between the agency and foster parent which may affect the natural parent, the child." (A. Weinstein 110a).

state has never had to meet the burden of establishing in a court of law that it had the right and power to intervene beyond the wishes of the parents. The condition for *benign* state intervention therefore must be that the state respect the right of both parents and children to family integrity, subject to the state's power to protect the child from abuse and neglect, *Stanley v. Illinois*, 405 U.S. 645 (1972).[79] Otherwise, voluntary foster care placement would simply be a "taking" of children by the State in the guise of benevolence. Such a result would be legally and morally intolerable.

By depriving the state of the power to return a child to his or her parents after one year of foster care placement and by requiring a hearing in each case the decision of the district Court changes the nature of *voluntary* foster placement from *benign* to *coercive* state intervention. This drastically impinges on the contractual and moral basis of the placement retrospectively. Without prior adjudication of abuse, neglect or abandonment the parents as a class must now be treated as unfit and subjected to burdensome legal procedures. Under the reasoning of *Stanley v. Illinois*, 405 U.S. 645 (1975) this is a denial of due process of law.

[79]This principle was recognized by the New York Court of Appeals in *In re Jewish Child Care Association v. Sanders*, 5 N.Y. 2nd 222, 183 N.Y.S. 2nd 65 (1959) where it explained that while the child care agency has the present legal right to custody of a child temporarily placed in foster care pursuant to S.S.L. §383(2), as against persons other than the child's parent it stands in a representative capacity as the protector of the parents inchoate custodial right and of the parent-child relationship which is to become complete again when the child is returned home. *Id.* 5 N.Y. 2nd at 229, 193 N.Y.S.2d at 70.

2. The decision of the district Court ignores the nature and the rights of the Family as a Unit.

The rights of parents and their children in foster care exist within the framework of the constitutionally protected family unit, as recognized by this Court. In *Stanley v. Illinois*, the Court said "the integrity of the family *unit* has found protection in the due process clause of the Fourteenth Amendment, 405 U.S. 645 at 651 (1972). In *Prince v. Massachusetts*, 321 U.S. 158 at 166, the Court took note of a "private realm of family life which the state cannot enter". In *Griswold v. Connecticut*, Mr. Justice Goldberg wrote that

> "the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted constitutional right."
>
> The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as fundamental rights specifically protected. 381 U.S. 479, 495 (1965).

The continued significance of the parent child unit. after, as well as before foster care is not simply a legal construct. Family ties persist despite foster care. Mothers of children in foster care feel deprived when they place their children in foster care; when children are returned their mothers feel thankful and relieved.[80]

[80](A. Jenkins 102a-103a.) Professor Jenkins testimony was based on a study of the parents of the children in foster care studied by Professor Fanshel. Her studies are reported in Jenkins & Norman, Filial Deprivation and Foster Care, New York Columbia University Press (1972) and Jenkins, *Beyond Placement: Mothers View Foster Care*, New York, Columbia University Press 1975.

The children whom agencies agree to return to their parents are wanted[81] by their parents. Typically they have continued their relationship through visiting.[82] The children also continue to identify with their parents. Professor Weinstein offered this explanation for the persistence of family ties:

> There are two lines of theoretical argument that would make such findings understandable to us: One is importance in Freudian theory of early attachments and the tendency for these to persist, but there is also another more social psychological as opposed to clinical reason for this–biological parenthood is of value in our society. Children in foster care are quite aware of the fact that they are different and that difference is something that is devalued. Children come to learn that being with one's biological parents is an important aspect of identity, something that they take on as ordinary members of society. I mean it [foster status] is a stigma for them.
>
> They often have a visible sign of the stigma, of the difference between their last name and the last name of the people with whom they live.[83]

Another witness, the family psychiatrist Dr. Henry Grunebaum of the Harvard Medical School added the further explanation that human need to understand

[81]Ms. Jane Edwards, Director of the Spence Chapin agency testified that before the agency agrees to return a child to their mother they look to "how she has demonstrated wanting the child." (A. 292a).

[82](A. Creech p. 286a, Brennan p. 137a; R-84 Edwards p. 118).

[83](A Weinstein 110a).

oneself as historically and biologically tied to certain people.[84]

However, the value of the natural parent-child relationship in our society does not and should not have to be justified by scientific proof, it has long been recognized by this Court:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399, 67 L.Ed. 1042, 1045, 43 S.Ct. 625, 29 A.L.R. 1446 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541, 86 L.Ed. 1655, 1660, 62 S.Ct. 1110 (1942), and [r]ights," far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 533, 97 L.Ed 1221, 1226, 73 S.Ct. 840 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166, 88 L.Ed. 645, 652, 64 S.Ct. 438 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, 67 L.Ed. at 1045, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, 86 L.Ed. at 1660, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496, 14 L.Ed.2d 510, 522, 85 S.Ct. 1678 (1965) (Goldberg, J., concurring).

Stanley v. Illinois, 405 U.S. 645, 651 (1972). In complete contradiction to those principles, the conclusion

[84](A. Grunebaum 248a-249a.) "What I object to . . . is the cavalier disregard of the value of one's biological tie. (A. Fanshel p. 181a).

of the district Court that the State must provide hearings before allowing a child in foster care to return to his parents sharply divorces the interest of the child from that of the family unit. This separation was unjustified.

3. The district Court erroneously assumed a conflict of interest between parents and children in all cases.

The Court below did not consider the parents' rights, or the rights of the child as part of a family unit. The Court assumed adversity of interest between the child and his parents. The Court based its holding on this Court's decision in *In re Gault*, 387 U.S. 1 (1967); *Tinker v. DesMoines School District*, 393 U.S. 503 (1969), *Goss v. Lopez*, 419 U.S. 565 (1975) and *Goldberg v. Kelly*, 397 U.S. 254 (1970). But in all four cases there was no asserted conflict between the interests of children and their parents. On the contrary, in *Gault* and *Tinker*, parents were supporting the rights of their children. In *Goldberg*, to the extent it involved mothers whose AFDC benefits had been terminated, the mothers were advocating their children's interests as their own. Similarly, in *Stanley v. Illinois*, 405 U.S. 645 (1972) and *Armstrong v. Manzo*, 380 U.S. 545, the parental interest asserted was not perceived to be in conflict with that of children. As conceptualized by this Court, within the context of the family unit, parents have rights on their own behalf as well as on behalf of their children. The Court identified rights of parents to their relationship with their children as "cognizable and substantial," *Stanley v. Illinois*, 405 U.S. 645, 652; the interest of parents in the welfare of their children was characterized in *Yoder v. Wisconsin*, 406 U.S. 205, 232 (1972). The Court stated

> "The history and culture of Western civilization reflect a strong tradition of parental concern for nurture and upbringing of their children. The primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition".

By placing a child in foster care, the parent temporarily unable to care for his or her children, provisionally transfers the power to make many critical decisions affecting the child's upbringing to the local social services official. It should not be that as a result of foster care placement with a particular foster parent for one year the child acquires the "right" to refuse to live with his parents when the public child care agency and his parents jointly determine that he or she could return home.

The district Court's recognition of a child's right not to be separated from a neutral familiar environment, when applied in the context of return home from foster care, in effect bestows on a child a protected interest in being apart from his family.

The creation of such a right conflicts with the traditional view that children have no right to refuse their parent's care, custody and companionship.

The traditional view is that children are incomplete persons who lack the capacity for independent choice and independent action required for the exercise of many of the activities encompassed within the concept of liberty.[85] Cf. *Goss v. Lopez*, 419 U.S. 565, 590-591 (1975) dissenting opinion, of Justice Powell and *Ginsberg v. New York*, 390 U.S. 629, 63, (1968)

[85] Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion, John Mill, *On Liberty*, 13-14.

concurring opinion of Mr. Justice Stewart. The organization of the family as a social unit in which parents make critical decisions for their children is consistent with this view. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The parent's role is not seen as harmful to children but as necessary and protective.[86] The ability of parents to determine that their children live with them is an indispensable condition to the concept of the family unit, cf. *Stanley v. Illinois*, 405 U.S. 645 (1972), and a child's independent right to choose not to live with his or her parents would seriously undermine the family's child rearing functions.[87] Thus while children may have independent interests consistent with the existence of the family unit, *Gault, Tinker* and *Goss*, or in extraordinary circumstances in conflict with the family unit, *Planned Parenthood of Central Missouri v. Danforth*, ____ U.S. ____, 49 L.Ed.2d 788 (1976), rights of children which destroy the family unit should not be recognized.

The district Court ignored the fact that it was postulating rights of children in derogation to the family unit. Ignoring the importance of the family unit, it attributed rights to children based on a theory of children's best interests which it found compatible. It preferred the risk of keeping children in foster care to the risk of returning them home to their parents. However, there is no consensus among social scientists

[86] Locke, John, the Second Treatise of Government. §61 "and thus we see how natural freedom and subjection to parents may coexist together and are both founded on the same principle."

[87] See Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations about Abandoning Youth to their "Rights,"* Brigham Young University Law Review, 1976, No. 3, p. 605 at 654-656.

or society at large as to children's best interests or how to attain them. The conflict of expert opinion in this case attests to this fact. As one commentator put it:

> "Deciding what is best for a child poses a question no less ultimate than the purpose and values of life itself . . . Society at large [provides] neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values."[88]

This Court's recognition of a constitutional zone of privacy protecting family life with respect to "activities relating to marriage–procreation, contraception–family relationship, and child rearing and education," *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citations omitted) respects this lack of consensus.

In assessing children's interests in this action the District Court was under an obligation to give great weight to the recognized claim of natural parents to custody and control of their children and the correlative concept, implicit in the decisions of this Court and deeply embedded in New York law, that absent extraordinary circumstances a child's best interest is to be in the care of his or her parents. *Spence-Chapin Adoption Services v. Polk*, 29 N.Y.2d 196, 324 N.Y.S.2d 937 (1971); *Bennett v. Jeffreys*, 40 N.Y.2d 543, 387 N.Y.S.2d 821 (1976). It is the parent, not the state or the foster parent, who is the child's natural ally and protector.

[88]Mnookin, *Child Adjudication: Judicial Functions in the Face of Indeterminancy*, 39 Law & Contemporary Problems, 226 (1975) at 260-261. See also Wald State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 Stanford Law Review, April, 1975, p. 985.

4. The District Court did not explain how to identify children's independent rights: If rights must be attributed to children in foster care, then such a child has a right to return home to his family.

The Court below held that children have rights independent of their parents but failed to explain how these rights are to be identified. The wishes of the thousands of children involved in this case cannot be reliably articulated by the children themselves. The Court below certified a class of children, from one year to eighteen years without regard to age differences. Thus, many of the children are too young to state their wishes, and even older children find articulation of subjective emotions difficult:

> "To face up to one's real emotions and to probe into one's real motives is not a capacity which we expect to find in children. On the contrary, children of all ages have a natural tendency to deceive themselves about their motivations, to rationalize their actions and to shy back from full awareness of their feelings, especially where conflicts of loyalty come into question."[89]

[89]Freud, On the Difficulties of Communicating with Children, in *The Family and the Law*, Goldstein & Katz, eds. (1965). Several of plaintiffs' witnesses testified that they would not expect a child to be able to decide with whom he or she should live, they would take the child's preferences into account. Thus Dr. Stella Chase, one of plaintiffs' witnesses, testified:

> Q. Do you think children are capable of forming judgments about where they want to live?
> A. Some children are and some aren't.
> Q. With regard to a child who is capable of forming, in your opinion, who is capable of forming a judgment as to where they want to live, how important is it to consider the child's opinion in a decision with regard to where the child should live?
> A. I would listen very carefully, but I wouldn't automatically act on it. . . . You have to evaluate the total circumstances and the child cannot be expected to be aware of the totality of the circumstances, so that his reaction is bound to be on the basis of only that segment of experiences that he has been through. (Chess, A., pp. 124a-125a. See also Solnit, A., p. 223a-224a.)

If the district Court found the identification of the interests of foster children with the rights of their parents incompatible, it nevertheless could not simply ignore the profound history and meaning of the parent-child relationship as recognized and interpreted by this Court since *Meyer v. Nebraska*, 262 U.S. 390 (1923), simply because it wished to recognize that children are "persons" under the Fourteenth Amendment. The district Court should have recognized that among the rights to be attributed to the children in this action (if "rights" are to be attributed regardless of capacity) is a child's right to his or her own family to the association, companionship and care of his or her parents, to his unique heritage, to be with his or her own siblings, in sum, to be at home.

That children have a substantial interest in their relationship to their parents has been acknowledged by this Court.

In *Levy v. Louisiana*, 391 U.S. 68, this Court, in assessing illegitimate children's claims to recover for the wrongful death of their mother, referred to the rights of a child "based on the intimate familial relationship between a child and his own mother", id. at 71. The Court's recognition that in their mother's death the children "suffered wrong," id. at 72, is complementary to the mother's right to recover for the loss of her illegitimate child in *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968); cf. *Mattis v. Schnarr*, 502 2d 588 (8th Cir. 1975). In *Gomez v. Perez*, 409 U.S. 535 (1973), the absent father is not caring for his children, yet it is the parent-child relationship which gives the illegitimate child the basis for their claim to support under Texas law. In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), the Court referred to "the natural affinity of children for their father," id. at 169, holding that it was as great in

the case of illegitimate as legitimate children. Chief Judge Breitel's statement, for the New York Court of Appeals, that a child in foster care is "not no one's child," *Spence-Chapin Adoption Services v. Polk*, 29 N.Y.2d 196, 199, 324 N.Y.S.2d 937, 939 (1971), rings true in relation to the rights of children as well as of the parents. Thus the traditional analysis that a child's best interest is that it be raised by its parents," *Id.* at 204, 944, can be accommodated into the view that a child has rights not only vicariously through his or her parents but also independent rights of its own, without undermining the principle that "child and parent have a right to be together." Id. at 199, 939.

In identifying the nature of the constitutional rights of children in this action, the district Court should have therefore identified the positive right of children in foster care to the companionship and care of their own parents in addition to any possible right of a child not to be separated from a familiar environment.

However, even if the wishes of the child could be satisfactorily articulated, there is no reliable system for determining when the child's right to the companionship and care of his parents is outweighed, by a right, not to be separated from a familiar environment. The variables are too personal and subjective to permit a clear line to be drawn. The question of when the state should cease to support a child's ties to his or her parents and encourage and protect the child's ties to foster parents then becomes a policy, not a constitutional decision. The issues involved are so complex and the conflicting rights so sensitive as to demonstrate that the decision is one of legislative choice.

The New York State Legislature has made its choice by its elaborate statutory scheme which, beginning with foster care review 18 months after placement under S.S.L. §392, increases the obstacles to discharge a child

with increasing time in foster care. The foster parents have not shown the legislative choice to be arbitrary and irrational. The Court below apparently found the foster parents psychological theories compatible with their own; but this was not a proper basis for a constitutional decision. *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963), *San Antonio School District v. Rodriguez*, 411 U.S. 1, 42-43 (1973).

C. The prior hearings required by the District Court impede the reunion of children and their parents.

The hearing mandated by the District Court will create a real and substantial impediment to the reunion of children with their parents yet the benefits provided by the hearing are dubious. The District Court's assertion that the mandated hearings will not "impede the right of biological parents to regain custody of their children"[90] is simply incorrect.

The requirement of an automatic hearing before the discharge of every child in foster care for more than a year creates a powerful incentive and opportunity for foster parents to subvert the child's relationship to his own parents in order to create a basis for victory in a subsequent custody contest.[91] Since there is a shortage of children available for adoption, this is a very real

[90] A.J.S. Appendix "A" p. 11a.

[91] *Strauss & Strauss, op cit*, 74 Columbia Law Review 996 (1974) at 1008.

risk.[92] This incentive is exactly contrary to the foster obligations to respect and support the childrens' ties to their parents. *State ex rel. Wallace v. Lhotan*, 51 App. Div. 2d 252, 380 N.Y.S.2d 250, 256 (2d Dept., 1976); *Spence-Chapin Adoption Services v. Polk*, 29 N.Y.2d 196, 205, 324 N.Y.S.2d 937, 945 (1972).

The power of the foster parents to undermine the child's relationship to his or her own parents is enormous. The foster parent may speak ill of the parent and may fail to cooperate in bringing children to the agency for visits with their parents. When hostility of children to their parents is permitted to grow the parent suffers the consequences,[93] but the child does too. Children torn between loyalty to their parents and the need to please foster parents on whom they depend for day to day care are subjected to great and harmful emotional stress.[94] This was described by Dr. Grunebaum who said:

> "It seems to me that to the extent to which foster parents feel that they can obtain custody of children either de facto or de jure . . . it places a potential incentive on the child's foster mother to separate and attenuate the relationship with the child's biological mother which can only be bad

[92] This is the danger that the foster care system would be undermined and converted into a kind of semi-adoption system as the need for adoptable children, the pressure for adoptable children grows and grows with abortion and contraception decreasing the supply of available children. So that such a practice could become in fact a means for taking children from poor parents and providing some of the relief from pressures for adoptable children, which is not what the foster care system was intended to provide at all." (Weinstein, A 11a).

[93] *State ex rel Wallace v. Lhotan*, 51 A.D.2d 252, 380 N.Y.S.2d, 250 (1976).

[94] Creech—The child is a loser no matter what. R-84.

> for the child. So that I think that, that can only be harmful. It is very analogous to the issue I spoke of earlier about custody. It is in a child's interest to feel that its biological parents are good people, that its heritage is a worthy one; and to the extent where one feels that his heritage has been denigrated, it seems to me to that extent one would suffer identity problems in later life, feeling that there is a part of oneself that is unworthy of respect.[95]

The standard governing New York custody proceedings between parents and non parents will not protect the parent-child relationship from efforts to undermine it.

The District Court held that reunion of children with their parents would not be impeded by the mandated hearings. It stated that appellants parents were confusing the *process* by which the decision to return children to their parents would be made with the *standard* for decision.[96]

In the circumstances presented by this case, this distinction is specious. It ignores the protracted nature of custody proceedings. It ignores the enormous

[95]A. Grunebaum, p. 253a-254a.

[96]The standard as enunciated by the New York Court of Appeals is as follows:

> "Except where a nonparent has obtained legal and permanent custody of a child by adoption, guardianship or otherwise, he who would take or withhold a child from mother or father must sustain the burden of establishing that the parent is unfit and that the child's welfare compels awarding its custody to the nonparent" *People ex rel Kropp v. Shepsky*, 305 N.Y. 465, 469, cited in *Spence Chapin Adoption Services v. Polk*, 29 N.Y.2d 196, 203 (1971).

emotional burden which forced participation in prolonged litigation will impose on the parent-child relationship. Paradoxically, it ignores the child.[97]

The court speaks of a "speedy and final decision" for the child[98] yet imposes a hearing requirement which by its nature cannot be speedy and by virtue of other provisions of law may well not be final.[99] S.S.L. §400(2) hearings are already long. (A. Mullaney, 141a) Fair hearing decisions are appealable to the New York Supreme Court (C.P.L.R. Article 78) and beyond.

The extraordinary delay which results from a contest over a child's return is illustrated by the cases of both the Rodriguez and the Wallace families where litigation lasted almost two years. Delay is the rule not the exception. See *Kessler v. Kessler*, 10 N.Y.2d 445, 459, 460 (1962); *People ex rel Wesell v. New York Foundling Hospital*, 36 A.D.2d 936, 937, 321 N.Y.S.2d 417, 419 (1st Dept. 1971);[100] *Finlay v. Finlay*, 240

[97]What this does to the children—the whetting of bitter emotions between their parents, the pulling and hauling from one temporary solution to another; the insecurity, often the direct appeal to the child to take sides and make choices which he is incapable of making—all this is too painfully obvious to need description. J. Despert, CHILDREN OF DIVORCE 189 (1962).

[98]A.J.S. Appendix "A" 16a.

[99]Gellhorn, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY 313 (1954). What is involved essentially [in custody disputes] is a determination of personality and emotional attitudes as they affect relationship between the parents and children . . . the adversary method is a painfully slow way of developing the mass of factual details out of which such attitudes can be made apparent and it may often fail to produce significant data. *Id.* at 310 (1962).

[100][S]ince [April, 1969] this matter has been in the Courts. Certainly if the child had been returned at the time of the initial request, this entire proceeding could well have been avoided without heartache or undue distress to anyone. . . . The observation that the child has spent most of her young life with the proposed adoptive parents, while accurate, has viability as a supportive argument only because of the interminable delay in those long drawn out proceedings) (dissenting opinion).

N.Y. 429, 434 (1925). Both parent and child will be deprived of each other's companionship in the long interim occasioned by custody litigation. A child who looks forward to returning home may feel hurt and not understand the delay. At the same time delay is particularly harmful because the passage of time itself tends to shift the equities against the natural parents. See *Bennett v. Jeffreys*, 40 N.Y.2d 543, 387 N.Y.S.2d 821 (1976).

Further shifting the equities against the natural parent is the nature of the standard itself.

Even given the primacy of parental rights the standard for decision in custody proceedings invites reliance on personal values and attitudes and leaves considerable scope for class bias in decision making.[101]

Custody decisions are influenced by many factors; poverty is one of them. The parent of a child in foster care is typically poor, uneducated and a member of a minority group. Therefore, in the contest between natural parent and foster parent, it is the natural parent who is likely to be at a disadvantage in the learning process.[102] This Court noted that for such a parent litigation may be especially "burdensome", *Stanley v. Illinois*, 405 U.S. 645, 648 (1972). The parent may be

[101] See generally R. Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminancy, 39 Law & Contemporary Problems 226, 255 (1975).

[102] See Ten Broek, California's Dual System of Family Law; Its Origins, Development and Present Status (pts. 1, 2), 16 Stan. L. Rev. 257, 900 (1964) (pt. 3), 17 Stan. L. Rev. 614 (1965). Ten Broek argues that there is in fact a dual system of family law—one law for the poor, another law for the rest of society. Demonstrative of the inequality inherent in the dual system is the burden of proof case on the poor person, whatever the issue may be, to make a case in his favor. See W. Weyrauch, Dual Systems of Family Law: A Comment in Ten Broek, *The Law of the Poor*, 457, 458.

unable to obtain counsel. He or she will amost certainly be unable to afford the costly expert testimony of psychiatrists and psychologists which is often crucial in custody contests. The New York Court of Appeals has recognized the problems:

> In custody matters parties and courts may be very dependent on the auxiliary services of psychiatrists, psychologists, and trained social workers. This is good. But it may be an evil when the dependence is too obsequious or routine or the experts too casual. Particularly important is this caution where one or both parties may not have the means to retain their own experts or experts compensated only by one side have uncurbed leave to express opinions which may be subjective or are not narrowly controlled. Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821 (1976).

For these reasons, the hearings impose a substantial impediment to the return of children to their parents. This Court has recognized that the imposition of a litigational burden can itself cause an unconstitutional detriment. *Stanley v. Illinois*, supra; *Armstrong v. Manzo*, 380 U.S. 545; *Speiser v. Randall*, 357 U.S. 513. The imposition of such a burden cannot be constitutionally supported simply in the name of "salutary" information gathering. Yet, as will be discussed in the following points, the hearings are of no value to the children involved.

D. Existing procedures in the New York State statutory scheme adequately protect the foster child who is returning home.

Without conceding that either foster parents or foster children were constitutionally entitled to the relief granted them by the district Court, it should be clear

that in fact New York State law already provides foster parents and foster children with a variety of procedures judicial and administrative for the protection of the child in foster care who is about to be returned home.

As Judge Pollack's dissenting opinion below points out, no showing has been made that agencies take undue risks in returning children to their parents. Strong safeguards for the correctness of this decision are provided first of all by New York's child protective laws.

An agency worker possessed of information—from any source—including informal communication from the foster parent, or the child that a child might be abused or neglected if returned to his or her parent would be doing so at considerable peril to herself. In 1973, New York State passed the Child Protective Service Act as part of its Social Services Law (S.S.L. 411 *et. seq.*) Together with the Departmental Regulations which followed (18 N.Y.C.R.R. §480.1 *et seq.* it provided, *inter alia*, a seven day a week, 24 hour a day Central Registry of child abuse (S.S.L. 422); mandatory reporting by certain professions (S.S.L. 414, 416, 418); and procedures for adequately investigating these reports (18 N.Y.C.R.R. 460.3). A worker in an agency who failed to report such suspicion is guilty of a Class A Misdemeanor (S.S.L. 420(1) and civilly liable as well. (S.S.L. 420(2)).

On the other hand an agency erroneously filing a report of abuse or neglect in good faith is protected from liability (F.C.A. §1024). If there is any indication that the natural parent would be neglectful or even that the child would be in imminent danger of becoming neglected an Article 10 proceeding would begin [F.C.A. 1012, 1013(d), 1032, 1033]. In these proceedings counsel for the child is always appointed (F.C.A. §249). The definitions of abused or neglected

children are broad enough to include situations of imminent and potential danger. F.C.A. §1012(e) & (f).

Further, the foster parents are permitted under this system to make a report of suspected abuse or neglect (S.S.L. §414) and to have direct access to the Court if such report is not acted upon (F.C.A. 1033). Thus the New York Child Protective Laws, combined with the natural tendency of child care agencies to take undue risks, prevents the careless return of children to their families, and a judicial procedure to avert it.

Further, the terms of S.S.L. §384(a) requires the agency to consider the risk of neglect or abuse, require the agency to take it into account when responding to a parent's request for the return of a child. Finally the 18 N.Y.C.R.R. 450.10 conference itself is an adequate opportunity for the foster parents to inform the agency of facts indicating possible neglect or abuse.

Social Services Law §392 review is mandated for every child 18 months after placement, regardless of the length of time a child has spent in a particular foster home; it is a full judicial proceeding.

In the 392 proceeding foster parents can by Order to Show Cause and Stay secure a review of the proposed move of the foster children in their care, *Matter of Dionisio R.*, Misc.2d 436, 366 N.Y.S.2d 280 (Family Court, New York County 1975); *In re Custody of Mack*, 81 Misc.2d 802, 367 N.Y.S.2d 644 (Family Court, Queens Co. 1975). In the Social Services Law §392 proceeding an indigent foster parent is even provided with assigned counsel, Family Court Act §262. Foster parents' right to resort to these remedies is not barred by the fact that children are in their physical custody, *Hicks v. Bridges*, 2 A.D. 335, 155 N.Y.S.2d 746 (App. Div. 1st Dept., 1956); *Application of Chin*, 41 Misc.2d 641, 246 N.Y.S.2d 306, 41 Misc.2d 650, 246 N.Y.S.2d 316 (1963). Social Services Law

§392 among other things a custody proceeding. In any custody proceeding the trial Court has power to issue stays. Such a stay was issued even in *In re W.*, 77 Misc.2d 374, 355 N.Y.S.2d 245 (Family Court, New York County 1974) the only case relied on by the district Court in its discussion of Social Services Law §392 proceedings.[103]

In a foster care review proceeding, the Court has the power to order that the child remain with a particular foster parent. *Matter of Cynthia S.*, 74 Misc.2d 935 (Family Court, N.Y. Co. 1973); *Guardianship of Denlow*, 384 N.Y.S.2d 621 (Fam. Ct., Kings Co., 1976); (Fam. Ct., Suffolk Co. 1976). See also *Matter of Mark H.*, 80 Misc.2d 593 (Fam. Ct., St. Lawrence Co., 1974), where the judge ordered the agency not to remove the child from the foster home without specific direction from the Court. The Family Court in foster care review proceedings has the same equitable powers as it does in any other proceeding. S.S.L. § 371-a, F.C.A. §165(b); and for the reasons given in cases cited the Family Court may make such an order.

In a foster care review proceeding, the Family Court has continuing jurisdiction, and a new petition may be filed at any time by any of the parties. S.S.L. §392(10); *Matter of Anonymous*, 48 App. Div.2d 696 (2nd Dept. 1975) rev. on other grds. 40 N.Y.2d 96 (1976). Thus when an agency threatens to remove a foster child, the foster parent may petition by Order to Show cause for a new foster care review, even if

[103]Joint Appendix p. 14a; fn 15, p. 20a. It is not clear whether foster parents may initiate habeas corpus proceedings against the child's parents cf. *Matter of Kurtis v. Ballou*, 33 App. Div.2d 1034 (2d Dept. 1970), they may do so against non-parents however, *Matter of Reed v. Daniels*, 45 App. Div.2d 990 (4th Dept. 1974).

twenty-four months have not elapsed since the last review, *Sugarman v. Speller*, 48 App. Div.2d 644 (1st Dept. 1975), even against the child's parents, in *In re Zweibel*, 79 Misc.2d 366, 358 N.Y.S.2d 795 (Fam. Ct., Nassau County 1974). In the *Zweibel* case no prior hearing was possible because the mother simply took the child home before legal process was possible.

Further, in the 392 review the Family Court may assign a law guardian–independent counsel–for the child pursuant to Family Court Act §249, and in fact the Family Court usually does so in any contested 392 proceeding. See, for example, *In re Spencer*, 74 Misc.2d 557, 346 N.Y.S.2d 645 (Family Court, New York County 1973); *Matter of Carla L.*, 45 A.D.2d 375, 357 N.Y.S.2d 987 (App. Div. 1st Dept. 1974); *Matter of Dionisio R., supra; In re Zweibel*, 79 Misc.2d 366, 358 N.Y.S.2d 795 (Family Court, Nassau County 1974); *In the Matter of Mark H.*, 80 Misc.2d 593, 363 N.Y.S.2d 73 (Family Court, St. Lawrence Co., 1974); *In re Janice K.*, 82 Misc.2d 983, 372 N.Y.S.2d 381 (Family Court, New York County, 1975). The Gandy children had such counsel. See AA "11". The provision for independent representation of children made by the district Court is in fact less than what is already provided under existing procedures. All named foster parents in this action were parties to Social Services Law §392 proceedings concerning the foster children in their care, at the time this action was commenced.

With respect to the Gandy children, the agency postponed their removal from the foster home of Mrs. Smith because a Social Services Law §392 review hearing concerning these children had already been scheduled in the New York Family Court for April 24, 1976, with Mrs. Smith as a party.[104] On that date Mrs. Smith appeared and secured an adjournment from the Court so that she could retain counsel.[105] Mrs. Smith

[104]A 7a #42, Affidavit of Graber.

[105]R. 50 pp. 25-26.

then secured the services of Ms. Lowry, who however, instead of returning to Family Court, instituted this action.

In the case of Appellees Goldberg, Mrs. Goldberg testified that the only time the removal of Rafael Serrano from that foster home was concretely discussed was by the Family Court Judge at a 392 review hearing; a 392 hearing in that case was in progress when she joined this action.[106] A 392 review had been held for the Wallace children in 1972, with the Lhotans as parties, and the Family Court had continuing jurisdiction pursuant to Social Services Law §392 (10). (A. p. 304a). Complementing those judicial and administrative proceedings are internal agency review mechanisms and extensive record keeping requirements and practices,[107] and agencies have extensive information concerning the children in their care, their parents and foster parents.

When the Court below suggested that hearings would serve a valuable "information gathering" function, the only example given of information to be gathered was "the frequency with which the biological parent had been visiting his or her child".[108] The Court here revealed its misunderstanding of the actual working of foster care system: visiting between parents and children in foster care is controlled and supervised by

[106]R-84 pp. 134-135, 139-141; R Affidavit of Louise Gruner Gans, 10/25/74.

[107]S.S.L. §372; 18 N.Y.C.R.R. 450.2(c)(1), (c)(2) and the successor regulations 18 N.Y.C.R.R. 606.12, 606.15, 606.16 and Rule 4.7 of the New York State Board of Social Welfare Rules 18 N.Y.C.R.R. Part 1, and require extensive and detailed record keeping. See A p. 95a-Form W853.

[108]A.J.S. "A" p. 10a.

the agencies.[109] The foster parents generally do not even know the natural parents so they are a most unlikely source of information about them.[110]

> Foster parents do not have the competence to plan for the child. They do not have access to the full information besetting the child's family, they do not have, by training, the ability to appraise the child's vulnerability.[111]

An additional factor which prevents the careless return of children to their parents is the tendency of New York public agencies to err in the opposite direction. Indeed the cases of two parents involved in this action illustrate this tendency.

In the case of the Wallace children, the decisions of the Trial Court and of the Appellate Court in *State ex. rel. Wallace v. Lhotan*, 51 A.D.2d 252, A.A. "9" show that the Nassau County Children's Bureau social workers confronted with the problem of growing hostility on the part of the children toward their mother,[112] proceeded with extreme caution. Only after

[109]Tr. 52-53, 82, 106, 119. See Special Services for Children, Policy Statement on Parental Visiting AA "8".

[110]Thus, in a recent foster care review proceeding pursuant to Social Services Law §392, the foster parents sought discovery of the agency's records on the basis of "the absence of knowledge on the foster parents' part as to the biologic [sic] parents." *Matter of Louis F.*, New York Law Journal, 11/1/76 p. 1, Col. 8 (Appellate Division, First Judicial Department (A.A. "12").

[111]A. Fanshel p. 164a.

[112]Professor Fanshel testified that: "...it's not infrequent to find agencies working with the problem of the foster parents being inhospitable to their own parent, or feeling that since they offer such superior care, why don't they take full possession of the child," A. Fanshel p. 162a, and that the effect of this is "to burden the foster child with a problem in counterpulls and identification," A. Fanshel p. 165a.

numerous visits to the Lhotan home in an effort to ameliorate the situation over a period of at least nine months, and only after professional consultation with two psychiatrists, a psychologist and a social worker, was the decision reached to return the two younger girls home immediately with the older ones to follow. The problem was not a lack of information. Although the agency had returned the two Wallace boys to Mrs. Wallace in 1972 and had found that she had the "capacity to mother appropriately" they nevertheless proceeded with extreme caution before making their decision to return the children home. The return was eventually sustained by the New York Courts as in the children's best interest.

The case of Appellant Naomi Rodriguez also illustrates the tendency of agencies to be very cautious and reluctant to discharge children. Mrs. Rodriguez placed the infant Edwin in foster care because of her marital difficulties and not because of her blindness. Throughout this time she continued to care for her older child without any difficulty, even after she had separated from her husband.[113] Nevertheless, the agency, concerned about her blindness and the small size of her apartment, refused to return Edwin. The opinion of the Appellate Division ultimately ordering his return to Mrs. Rodriguez suggests the agency acted with too much caution rather than too little. 52 A.D.2d 299, 383 N.Y.S.2d 883 (1st Dept. 1976).

The testimony of the directors of three authorized child care agencies as to the manner in which they reach a decision to return a child home to his or her parents is entirely consistent with these cases. It is a slow and deliberate process taking months or even years[114] where decisions are made with the help of child

[113]A p. 68a.

[114]A Edwards p. 292a T106-107.

psychiatrists,[115] and always reviewed on several staff levels at the agency.[116] If anything, agencies have been excessively careful, slow and deliberate. The New York Temporary State Commission on Child Welfare has reported that, because funds for foster care services depend on children being in placement, "it is not only fiscally desirable, but advantageous for local agencies to maintain children in foster care.[117] This factor tends to contribute to the deliberateness of the discharge process. Neither deliberateness nor information are lacking. The extent and variety of safeguards surrounding agency decisions to return children to their parents suggest that the creation of another administrative procedure parallel to and conflicting with the provisions of S.S.L. §392, 384-a and 383(1) is not required to minimize risk of overall error, *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976); *Fusari v. Steinberg*, 419 U.S. 379, 383 fn6 (1975) but it will surely create havoc in the operation of the foster care system.

E. It was error to hold that prior hearings are required when children have been in foster care after exactly one year; the court had no basis for fixing this time period.

The majority opinion held that hearings are required prior to returning a child home after the children have lived in foster care exactly one year.

[115]A Creech 276a-277a T54-55.

[116]A Edwards 288a-299a T4-5, 95-96.

[117]*The Children of the State II* Annual Report 1976 of the Temporary State Commission on Child Welfare, Albany, New York 1976, p. 19.

The opinion provides no explanation of the significance of the one year measure, but merely accepts the time measure suggested by the foster parents to define the class. No witness testified that anything significant in a child's development in foster care occurred at *one year* as opposed to any other time period. On the contrary, the testimony was that one year had no special significance.[118] Witnesses repeated described time measurement as "arbitrary"[119]

Professor Eugene Weinstein testified:

> My data would imply that the costs to a child of being pushed to abandon its relationship with its natural parents or the failure to take advantage of opportunities to return the child to its natural parents when the child has an attachment to them would be riskier than leaving them in a foster home automatically by virtue of the fact that he has spent one year in that home.

There is no evidence in the record to suggest that time periods selected by the legislature for recognizing the interests of foster parents in relation to foster children pursuant to Social Services Law §392 and 383(3) are irrational or unreasonable. As Judge Pollack pointed out in his dissent,[1] since the New York Legislature does not permit any legal recognition of a child's relationship to foster parents as against the child's own parents until the child had been in foster care for 24 months, and the time measures were not shown to be irrational or unfair, the district Court should have deferred to the judgment of the New York State Legislature instead of legislating by judicial fiat. *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

[118]"One year for a newborn infant is 100 percent of his life. One year for a 10 year old child is a tenth of his life. It is entirely different durations of separation, entirely different meaning." (R-92 Grunebaum, pp. 29-30).

[119]A Goldstein p. 204a; A Fanshel p. 117a.

The decision of the district Court to require hearings at the one year period is particularly shocking because there was no need for it in relation to any foster parents or foster children who were before the Court. They all had Social Services Law §392 proceedings available to them to contest the removal of the foster children.

III.

THE DISTRICT COURT ERRED IN CERTIFYING THE CHILDREN AS A CLASS BECAUSE THE REQUIREMENTS OF RULE 23(a)(3) AND 23(a)(4) WERE NOT MET.

Although Helen Buttenwieser as counsel for the children never moved to have a class of children certified,[120] on March 22, 1976 Judge Carter certified a class of children who had been in foster care in a particular foster home for at least one year. This class certification was in error because the claims of the named children are not typical of the claims of the class, nor can these fairly and adequately represent the class, as required by Rule 23 of the Federal Rules of Civil Procedure.

In three material areas, the named children were atypical of the class which the Court below held they represented. First, while the named children had been in foster care at least four years when the action was commenced, the class consists of all children who have been in foster home care for one year or more. It was

[120]Counsel for the foster parents made such a motion prior to her removal as counsel for the children. It should be noted that Judge Carter explicitly ruled that she was not capable of representing the children fairly.

not and cannot be disputed that four years in foster care is substantially longer than one year. The effect on children of leaving a foster home after four years as opposed to one year or even two years is likely to be substantially different.

The named children thus have no standing to represent these other children who are not injured as the District Court thought the named children were injured.

As this Court held in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974):

> To have standing to sue as a class representative it is essential that the plaintiff must be part of that class; that is, he must possess the same interest and suffer the same injury *shared by all members of the class he represents.* [Emphasis added.]

Second, none of the named children had seen their parents in more than a year. Since the class certified includes children who see their parents frequently, the named children are again not typical of all the members of the class and the class was overly broad. Again, it was not disputed that parental visiting of children in foster care is of utmost importance in maintaining a relationship between parent and child and in facilitating the return of the child to his family.

Children who have continuing relationships to their parents while in foster care are less likely to wish to remain in foster care; they are consequently less likely to wish to have a hearing prior to returning to their parents than are children who, like the named children, have not seen their parents for an extended period of time.

Finally, all the named children had "warm and loving" relationships with their foster parents. It was these relationships which the hearing sought was to safeguard. Many members of the class of children who

have been in foster care for one year or more do not have such warm relationships to their foster parents and are eager to leave. To them a hearing is merely a barrier to their leaving an unfriendly or uncomfortable environment. The named children's claims are not typical of these children either; since the class as certified includes them, it is overly broad. *Taylor v. Safeway Stores, Incorporated*, 524 F.2d 263 (10th Cir. 1975); *Davis v. Weir*, 497 F.2d 139 (5th Cir. 1974).

The named children cannot adequately represent the class since many members of the class want to return home as quickly as possible and do not want a pre-removal hearing to delay their return. A class representative may not maintain a class suit if his interests are antagonistic to some of the persons he claims to represent, *Phillips v. Klassen*, 502 F.2d 362 (D.C. Cir. 1974), cert. den. 419 U.S. 996 (1974), *Schy v. Susquehana Corporation*, 419 F.2d 1112 (7th Cir. 1970), cert. den. 400 U.S. 826 (1970), or if some class members benefit by a challenged law and want it upheld, *Swarb v. Lennox*, 314 F.Supp. 1091 (E.D. Pa. 1970), aff'd 405 U.S. 191 (1972), reh. den. 405 U.S. 1049 (1972), *Ward v. Luttrell*, 292 F.Supp. 165 (E.D. La. 1968), because a person cannot adequately protect those with interests contrary to his own. *Hansberry v. Lee*, 311 U.S. 32 (1940).

Even counsel for the foster parents, who originally sought to represent the children also, has recognized the antagonistic interests among foster children. In *Child v. Beame*, 412 F.Supp. 593 (S.D.N.Y. 1976), she argued that foster care harmed children who had been or "should be" freed for adoption, in that it denied them the right to a "permanent stable home," 412 F.Supp. at 596, and constituted "cruel and unusual punishment" and "violation of the right to treatment," 412 F.Supp. at 608. Many members of the class in the instant action are also members of the class in *Child v. Beame*,

including Rafael Serrano.[121] Counsel's conflicting claims on behalf of the same children are logically inconsistent.

The court must also look at "any other facts bearing on the ability of the named party to speak for the proposed class." *duPont v. Perot*, 59 F.R.D. 404, 410 (S.D.N.Y., 1973).

The New York courts found that the Wallace girls were so under the control of their foster mother that their expressed wishes were contrary to their actual interests. *State ex rel. Wallace v. Lhotan*, 51 App. Div.2d 252, 380 N.Y.S.2d 250 (2d Dept. 1976), motion for lv. to App. den. 39 N.Y.2d 705 (1976). These children whom the foster parents would have acted as representatives of the class, are not able to protect even their own interests adequately. They certainly cannot be said to protect adequately the interests of the entire class. Class certification should have been denied.

Class action motions should not be granted as a matter of course. Since absent members of the class will be bound by the judgment, a court must carefully examine the class the named party purports to represent, to decide if it is a true class and the party is a proper and adequate representative. *Green v. Wolf Corporation*, 406 F.2d 291, 298 (2d Cir. 1968), cert. den. 395 U.S. 977 (1969), *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir., 1968), rev. other grounds 417 U.S. 156 (1974); *Rutledge v. Electric Hose & Rubber Company*, 511 F.2d 668, 673 (9th Cir. 1975). In doing so, the requirements of Rule 23(a) must be "strictly construed and stringently applied" in order to protect the absent class members. *Hettinger v. Glass Specialty Co., Inc.*, 59 F.R.D. 286, 296 (N.D. Ill. 1973). This the District Court did not do.

[121]Rafael was a child who "should have been freed for adoption," Complaint, R12, and whose foster parents did not want to adopt him (T135-136, 143-144).

If a proposed class does not meet the requirements of Rules 23(a)(3) and (4), a court must do one of two things. Either it must deny certification, cf. *City of Chicago v. General Motors Corporation*, 332 F.Supp. 285, 288 (N.D. Ill. 1971), aff'd 467 F.2d 1262 (7th Cir. 1972); *Shulman v. Ritzenberg*, 47 F.R.D. 202, 207-208 (D.C. 1969); *Koehler v. Ogilvie*, 53 F.R.D. 98 (N.D. Ill. 1971), aff'd mem. 405 U.S. 906 (1972); or it must narrow the class sufficiently to meet those requirements. Cf. *Elkind v. Liggett & Myers, Inc.*, 66 F.R.D. 36 (S.D.N.Y. 1975); *Insley v. Joyce*, 330 F.Supp. 1228 (N.D. Ill. 1971); *Equal Employment Opportunity Commission v. Detroit Edison Company*, 515 F.2d 301 (6th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3214; *Freeman v. Motor Convoy, Inc.*, 68 F.R.D. 196 (N.D. Ga. 1975); *Swarb v. Lennox, supra.*

In the instant case the antagonism between those children who wish to have hearings and those who do not is dependent on individual factors, and would require the Court to look into the circumstances of each child and his family to determine whether or not the child should be a member of the class. The class is therefore incapable of definition, *Koen v. Long*, 302 F.Supp. 1383 (E.D. Mo. 1969), aff'd per curiam 428 F.2d 876 (8th Cir. 1970), cert. den. 401 U.S. 923 (1971); *Chaffee v. Johnson*, 229 F.Supp. 445 (S.D. Miss. 1964), aff'd other grounds 352 F.2d 514 (5th Cir. 1965), cert. den. 384 U.S. 956 (1966), and it was error for the Court to certify it.

IV.

THE REFUSAL TO PERMIT INTERVENORS TO RAISE AND PROVE THEIR DEFENSES WAS ERROR.

The District Court erred in striking intervenors' fourteenth affirmative defense and in refusing to let intervenors present testimony at trial. A party who intervenes in an action as a matter of right, under Rule 24(a), has the right to litigate fully the merits of the action, 3B *Moore's Federal Practice* ¶24.16 [1], at 24-593, *In re Oceana International, Inc.*, 49 F.R.D. 329, 333 (S.D.N.Y. 1970); and is for all purposes an original party. *In re Raabe, Glissman & Co., Inc.*, 71 F.Supp. 678, 680 (S.D.N.Y. 1947). He must be allowed to raise and litigate and defense, counterclaim, or cross-claim which he may have. *Stewart-Warner Corporation v. Westinghouse Electric Corporation*, 325 F.2d 822, 827 (2d Cir. 1963), cert. den. 376 U.S. 944 (1964); *Chalmers v. United States*, 43 F.R.D. 286, 289 (D. Kan. 1967).

In the instant case, the court below struck intervenors' defense that they relied on the placement forms and the representations of agents of the City that the placement of their children would be with an authorized agency and not with individual foster parents. Additionally, the court permitted only one of intervenors' witnesses to testify, and her testimony was terminated prematurely. As a result of this, intervenors were in effect barred from making their case at trial.

By listening to testimony from one side only, the Court was able to base its decision on the assumption that parents are not involved in the foster care system, when this is not the case (A. 307a). The parents' witnesses wanted to show that, contrary to the individual experiences of the two foster parents who

testified, parents of children in foster care are very much involved in the lives of their children. They maintain strong attachments to their children through frequent visiting (A. 309a, 70a, 74a-75a), and the children adjust readily to their return home (A. 307a, 309a).

Plaintiff foster parents were permitted to testify at length and in detail. That the court carefully considered their claims is evident from the long discussion of each of the named foster parents in the decision of the court below. The natural parents, however, were not permitted to present any evidence. The Court, in permitting the natural parents to intervene, recognized that they have an interest in their own children, but then refused them to present evidence of their interest. This refusal was erroneous. *Stewart-Warner Corporation v. Westinghouse Electric Corporation, supra.* As the Court held in *Spangler v. United States*, 415 F.2d 1242 (9th Cir. 1969), vacated and remanded on other grounds, ____ U.S. ____, 96 S.Ct. 2697 (1976), citing 4 *Moore's Federal Practice*, ¶24.16 [4] p. 117 (2d ed. 1968):

> It would be meaningless to give [a party] an absolute right to intervene in order to protect his interests, if once in the proceedings he was barred from raising questions necessary for his own protection.
>
> *Id.* at 1245.

See also *Harrison v. Nixon*, 9 Pet. 483 (1835), where intervenors were permitted wide latitude in their defenses.

The failure to permit intervenors to raise their defenses severely prejudiced them. They were never permitted to offer anything to counter plaintiff's charges that they were unfit parents. They were also not permitted to show that agencies do not return

children arbitrarily but in fact are extremely cautious and frequently refuse to return children despite the parents' readiness and attempts to get them back.[122]

The striking of intervenors' defense of reliance precluded intervenors from showing that if the foster care system is to continue, parents must be able to rely on the ability of the State to return children when the State and parents agree that the children should come home. Otherwise, parents will not voluntarily place their children in foster care, sometimes to the detriment of the entire family in distress.

The failure to permit intervenors to raise and prove their defenses rendered their intervention meaningless; and in adjudicating the claims without permitting intervenors to raise defenses to them, the Court denied intervenors due process of law. *Lindsay v. Normet*, 405 U.S. 56, 66 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970); *Reynolds v. Cochran*, 365 U.S. 525, 530-531 (1961).

CONCLUSION

Wherefore, Appellants Rodriguez et al, parents of children voluntarily placed in foster care, respectfully pray that the Order and Judgment below be reversed and the Second Amended Complaint be dismissed, or that the Order and Judgment of the district Court be reversed to the extent it deprives public child care agencies of the power to consent to the return of

[122](A. 306a, 70a-72a, 74a-75a).

children to their parents and to deprive the parents of the right to have their children returned to them, and for such other and further relief as to the Court may seem just.

New York, New York
Dated: December 17, 1976

Respectfully submitted,

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INDEX TO APPENDICES

APPENDIX 1

CHALLENGED STATUTES AND REGULATIONS

New York Social Services Law § 383(2):

The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.

New York Social Services Law § 400: Removal of Children.

1. When any child shall have been placed in an institution or in a family home by a commissioner of public welfare or a city public welfare officer, the commissioner or city public welfare officer may remove such child from such institution or family home and make such disposition of such child as is provided by law.

2. Any person aggrieved by such decision of the commissioner of public welfare or city welfare officer may appeal to the department, which upon receipt of the appeal shall review the case, shall give the person making the appeal an opportunity for a fair hearing thereon and within thirty days render its decision. The department may also, on its own motions [sic], review any such decision made by the public welfare official. The department may make such additional investigation as it may deem necessary. All decisions of the department shall be binding upon the public welfare district involved and shall be complied with by the public welfare officials thereof.

18 N.Y.C.C.R. §450.14* Removal from foster family care.

(a) Whenever a social services official or another authorized agency acting on his behalf proposes to remove a child in foster family care from the foster family home, he or such other authorized agency, as may be appropriate, shall notify the foster family parents, in writing, of the intention to remove such child at least 10 days prior to the proposed effective date of such removal, except where the health or safety of the child requires that he be removed immediately from the foster family home. Such notification shall further advise the foster family parents that they may request a conference with the social services official or a designated employee of his social services department at which time they may appear, with or without a representative to have the proposed action reviewed, be advised of the reasons therefor and be afforded an opportunity to submit reasons why the child should not be removed. Each social services official shall instruct and require any authorized agency acting on his behalf to furnish notice in accordance with the provisions of this section. Foster parents who do not object to the removal of the child from their home may waive in writing their right to the ten day notice, provided, however, that such waiver shall not be executed prior to the social services official's determination to remove the child from the foster home and notifying the foster parents thereof.

(b) Upon the receipt of a request for such conference, the social services official shall set a time and place for such conference to be held within 10 days of receipt of such request and shall

*This regulation was renumbered 450.10 as of September 18, 1974.

send written notice of such conference to the foster family parents and their representative, if any, and to the authorized agency, if any, at least five days prior to the date of such conference.

(c) The social services official shall render and issue his decision as expeditiously as possible but not later than five days after the conference and shall send a written notice of his decision to the foster family parents and their representative, if any, and to the authorized agency, if any. Such decision shall advise the foster family parents of their right to appeal to the department and request a fair hearing in accordance with section 400 of the Social Services Law.

(d) In the event there is a request for a conference, the child shall not be removed from the foster family home until at least three days after the notice of decision is sent, or prior to the proposed effective date of removal, whichever occurs later.

(e) In any agreement for foster care between a social services official or another authorized agency acting on his behalf and foster parents, there shall be contained therein a statement of a foster parent's rights provided under this section.

APPENDIX 2

CONSTITUTIONAL PROVISION

United States Constitution, Amendment XIV.

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

APPENDIX 3

OTHER NEW YORK SOCIAL SERVICES LAW PROVISIONS

New York Social Services Law § 383. Care and custody of children

1. The parent of a child remanded or committed to an authorized agency shall not be entitled to the custody thereof, except upon consent of the court, public board, commission, or official responsible for the commitment of such child, or in pursuance of an order of a court or judicial officer of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. The name of such child shall not be changed while in the custody of an authorized agency.

3. Any adult husband and his adult wife and any adult unmarried person, who, as foster parent or parents, have cared for a child continuously for a period of two years or more, may apply to such authorized agency for the placement of said child with them for the purpose of adoption, and if said child is eligible for adoption, the agency shall give preference and first consideration to their application over all other applications for adoption placements. However, final determination of the propriety of said adoption of such foster child shall be within the sole discretion of the court, as otherwise provided herein.

Foster parents having had continuous care of a child, for more than twenty-four months, through an authorized agency, shall be permitted as a matter of right, as an interested party to intervene in any proceeding involving the custody of the

child. Such intervention may be made anonymously or in the true name of said foster parents.

New York Social Services Law § 384-a. Transfer of care and custody of children

1. Method. The care and custody of a child may be transferred by a parent or guardian to an authorized agency by a written instrument in accordance with the provisions of this section.

2. Terms. (a) The instrument shall be upon such terms, for such time and subject to such conditions as may be agreed upon by the parties thereto. The department may promulgate suggested terms and conditions for inclusion in such instruments, but shall not require that any particular terms and conditions be included. If the instrument provides that the child is to be returned by the authorized agency on a date certain or upon the occurrence of an identifiable event, such agency shall return such child at such time unless such action would be contrary to court order entered at any time prior to such date or event pursuant to section three hundred eighty-four or section three hundred ninety-two of this chapter or article six or article ten of the family court act. The parent or guardian may, upon written notice to such agency, request return of the child at any time prior to the identified date or event, whereupon such agency may, without court order, return the child or, within ten days after such request, may notify the parent or guardian that such request is denied. If such agency denies or fails to act upon such request, the parent or guardian may seek return of the care or custody of the child by petition in family court for return of such child and order to show cause, or by writ of habeas corpus in the supreme court. If the instrument fails to specify a date or identifiable event

upon which such agency shall return such child, such agency shall return the child within ten days after having received notice that the parent or guardian wishes the child returned, unless such action would be contrary to court order entered at any time prior to the expiration of such ten day period pursuant to section three hundred eighty-four or section three hundred ninety-two of this chapter or article six or article ten of the family court act. Expenditures by a social services district for the care and maintenance of a child who has been continued in the care of an authorized agency in violation of the provisions of this subdivision shall not be subject to state reimbursement.

(b) No provisions set forth in any such instrument regarding the right of the parent or guardian to visit the child or to have services provided to the child and to the parent or guardial to strengthen the parental relationship may be terminated or limited by the authorized agency having the care and custody of the child unless: (i) the instrument shall have been amended to so limit or terminate such right, sursuant to subdivision three of this section; or (ii) the right of visitation or to such services would be contrary to or inconsistent with a court order obtained in any proceeding in which the parent or guardian was a party.

(c) The instrument, or a separate statement appended thereto, shall include a recitation, in lay terms, advising the parent or guardian:

(i) that the law permits the instrument to specify a date certain or an identifiable event upon which the child is to be returned;

(ii) that the parent or guardian has a right to supportive services, to visit the child, and to have the child returned to him or her, in accordance with the terms of the instrument and subject to the provisions of this section;

(iii) that the parent or guardian, subject to the terms of the instrument, has an obligation

(A) to visit the child,

(B) to plan for the future of the child,

(C) to meet with and consult the agency about such plan,

(D) to contribute to the support of the child to the extent of his or her financial ability to do so, and

(E) to inform the agency of any change of name and address;

(iv) that the failure of the parent or guardian to meet the obligations listed in subparagraph (iii) could be the basis for a court proceeding for the commitment of the guardianship and custody of the child to an authorized agency;

(v) that the parent or guardian has a right at any time, including prior to the signing of the instrument, to consult an attorney. The agency shall provide the parent or guardian with a list of attorneys or legal services organizations, if any, which provide free legal services to persons unable to otherwise obtain such services.

3. Amendment. The parties to the instrument or anyone acting on their behalf with their consent may amend it by mutual consent but only by a supplemental instrument executed in the same manner as the original instrument. The supplemental instrument shall be attached to, and become part of, the original instrument. The supplemental instrument shall contain the recitation required in paragraph (c) of subdivision two.

4. Execution. The instrument shall be executed in the presence of one or more witnesses and shall include only the provisions, terms and conditions agreed upon by the parties thereto.

5. Records. The instrument shall be kept in a file maintained for that purpose by the agency accepting the care and custody of the child. A

copy of the instrument shall be given to the parent or guardian at the time of the execution of the instrument.

6. An instrument executed pursuant to the provisions of this section shall not constitute a remand or commitment pursuant to this chapter.

New York Social Services Law § 384-b. Guardianship and custody of destitute or dependent children; commitment by court order

1. Statement of legislative findings and intent.

(a) The legislature hereby finds that:

(i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive;

(ii) it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered;

(iii) the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home; and

(iv) when it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child.

(b) The legislature further finds that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive,

nurturing family relationships and have deleterious effects on their development into responsible, productive citizens. The legislature further finds that provision of a timely procedure for the termination, in appropriate cases, of the rights of the natural parents could reduce such unnecessary stays.

It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption.

2. For the purposes of this section, "child" shall mean a person under the age of eighteen years.

3. (a) The guardianship of the person and the custody of a destitute or dependent child may be committed to an authorized agency, or to a foster parent authorized pursuant to section three hundred ninety-two of this chapter or to section one thousand fifty-five of the family court act to institute a proceeding under this section, by order of a surrogate or judge of the family court, as hereinafter provided. Where such guardianship and custody is committed to a foster parent, the family court or surrogate's court shall retain continuing jurisdiction over the parties and the child and may, upon its own motion or the motion of any party, revoke, modify or extend its order, if the foster parent fails to institute a proceeding for the adoption of the child within six months after the entry of the order committing the guardianship and custody of the child to such foster parent. Where the foster parent institutes a proceeding for the adoption of the child and the adoption petition is finally denied or dismissed,

the court which committed the guardianship and custody of the child to the foster parent shall revoke the order committing the guardianship and custody of the child to a foster parent, it shall commit the guardianship and custody of the child to an authorized agency.

(b) A proceeding under this section may be originated by an authorized agency or by a foster parent authorized to do so pursuant to section three hundred ninety-two of this chapter or to section one thousand fifty-five of the family court act.

(c) Proceedings under this section shall be originated in the county in which the authorized agency has an office for the regular conduct of business or in which the child or his parent resides at the time of the initiation of the proceeding.

(d) The family court shall have exclusive, original jurisdiction over any proceeding brought upon grounds specified in paragraphs (c) or (d) of subdivision four of this section, and the family court and surrogate's court shall have concurrent, original jurisdication over any proceeding brought upon grounds specified in paragraphs (a) or (b) of subdivision four.

(e) A proceeding under this section is originated by a petition on notice served upon the child's parent or parents and upon such other persons as the surrogate or judge may in his discretion prescribe. Such notice shall inform the parents and such other persons that the proceeding may result in an order freeing the child for adoption without the consent of or notice to the parents or such other persons. Such notice also shall inform the parents and such other persons of their right to the assistance of counsel, including any right they may have to have counsel assigned by the court in any case where they are financially unable to obtain counsel. When the preceding is

initiated in family court service of the petition and other process shall be made in accordance with the provisions of section six hundred seventeen of the family court act, and when the proceeding is initiated in surrogate's court, service shall be made in accordance with the provisions of section three hundred seven of the surrogate's court procedure act.

(f) In any proceeding under this section in which the surrogate's court has exercised jurisdiction, the provisions of the surrogate's court procedure act shall apply to the extent that they do not conflict with the specific provisions of this section. In any proceeding under this section in which the family court has exercised jurisdiction, the provisions of articles one, two and eleven of the family court act shall apply to the extent that they do not conflict with the specific provisions of this section. Any proceeding originated in family court upon the ground specified in paragraph (d) of subdivision four of this section shall be conducted in accordance with the provisions of part one of article six of the family court act.

(g) An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon a finding that one or more of the grounds specified in paragraphs (a), (b) or (d) of subdivision four are based upon a fair preponderance of the evidence, or upon a finding that one or more of the grounds specified in paragraph (c) of subdivision four are based upon clear and convincing proof.

(h) In any proceeding brought upon a ground set forth in paragraph (c) of subdivision four, neither the privilege attaching to confidential communications between husband and wife, as set forth in section forty-five hundred two of the civil practice law and rules, nor the physician-patient and related privileges, as set forth in section

forty-five hundred four of the civil practice law and rules, nor the psychologist-client privilege, as set forth in section forty-five hundred seven of the civil practice law and rules, nor the social work-client privilege, as set forth in section forty-five hundred eight of the civil practice law and rules, shall be a ground for excluding evidence which otherwise would be admissible.

(i) In a proceeding instituted by an authorized agency pursuant to the provisions of this section, proof of the likelihood that the child will be placed for adoption shall not be required in determining whether the best interests of the child would be promoted by the commitment of the guardianship and custody of the child to an authorized agency.

(j) The order and the papers upon which it was granted in a proceeding under this section shall be filed in the court, and a certified copy of such order shall also be filed in the office of the county clerk of the county in which such court is located, there to be recorded and to be inspected or examined in the same manner as a surrender instrument, pursuant to the provisions of section three hundred eighty-four of this chapter.

(k) Where the child is over fourteen years of age, the court may, in its discretion, consider the wishes of the child in determining whether the best interests of the child would be promoted by the commitment of the guardianship and custody of the child.

4. An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon one or more of the following grounds:

(a) Both parents of the child are dead, and no guardian of the person of such child has been lawfully appointed; or

(b) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, abandoned such child for the period of six months immediately prior to the initiation of the proceeding under this section; or

(c) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, are presently and for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately prior to the initiation of the proceeding under this section; or

(d) The child is a permanently neglected child.

5. (a) For the purposes of this section, a child is "abandoned" by his parent if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed.

(b) The subjective intent of the parent, whether expressed or otherwise, unsupported by evidence of the foregoing parental acts manifesting such intent, shall not preclude a determination that such parent has abandoned his or her child. In making such determination, the court shall not require a showing of diligent efforts, if any, by an authorized agency to encourage the parent to perform the acts specified in paragraph (a) of this subdivision.

6. (a) For the purposes of this section, "mental illness" means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment of such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act.

(b) For the purposes of this section, "mental retardation" means sub-average intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act.

(c) The legal sufficiency of the proof in a proceeding upon the ground set forth in paragraph (c) of subdivision four of this section shall not be determined until the judge has taken the testimony of a physician and psychologist, or psychiatrist, in accordance with paragraph (e) of this subdivision.

(d) A determination or order upon a ground set forth in paragraph (c) of subdivision four shall in no way affect any other right, or constitute an adjudication of the legal status of the parent.

(e) In every proceeding upon a ground set forth in paragraph (c) of subdivision four the judge shall order the parent to be examined by, and shall take the testimony of, a physician and a certified psychologist, in the case of a parent alleged to be mentally retarded, or of a psychiatrist, in the case of a parent alleged to be mentally ill, such physician, psychologist or psychiatrist to be appointed by the court pursuant to section thirty-five of the judiciary law. The parent and the authorized agency shall have the right to submit

other psychiatric, psychological or medical evidence. If the parent refuses to submit to such court-ordered examination, or if the parent renders himself unavailable therefor whether before or after the initiation of a proceeding under this section, by departing from the state or by concealing himself therein, the appointed physician, psychologist or psychiatrist, upon the basis of other available information, including, but not limited to, agency, hospital or clinic records, may testify without an examination of such parent, provided that such other information affords a reasonable basis for his opinion.

7. (a) For the purposes of this section, "permanently neglected child" shall mean a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, nothwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child. In the event that the parent defaults after due notice of a proceeding to determine such neglect, such physical and financial ability of such parent may be presumed by the court.

(b) For the purposes of paragraph (a) of this subdivision, evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child. A visit or communication by a parent with the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact.

(c) As used in paragraph (a) of this subdivision, "to plan for the future of the child" shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent.

(d) For the purposes of this subdivision:

(i) A parent shall not be deemed unable to maintain contact with or plan for the furture of the child by reason of such parent's use of drugs or alcohol, except while the parent is actually hospitalized or institutionalized therefor;

(ii) A parent shall be deemed unable to maintain contact with or plan for the future of the child while he is actually incarcerated; and

(iii) The time during which a parent is actually hospitalized, institutionalized, or incarcerated shall not interrupt, but shall not be part of, a period of failure to maintain contact with or plan for the future of a child.

(e) Notwithstanding the provisions of paragraph (a) of this subdivision, evidence of diligent efforts by an agency to encourage and strengthen the parental relationship shall not be required when the parent has failed for a period of six months to keep the agency apprised of his or her location.

(f) As used in this subdivision, "diligent efforts" shall mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationsip between the parent and child, including but not limited to:

(1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;

(2) making suitable arrangements for the parents to visit the child;

(3) provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated; and

(4) informing the parents at appropriate intervals of the child's progress, development and health.

8. Nothing in this section shall be construed to terminate, upon commitment of the guardianship and custody of a child to an authorized agency or foster parent, any rights and benefits, including but not limited to rights relating to inheritance, succession, social security, insurance and wrongful death action claims, possessed by or available to the child pursuant to any other provision of law.

New York Social Services Law § 392. Foster care status; periodic family court review

1. As used in this section, unless otherwise expressly stated or unless the context requires a different interpretation, (a) "foster care" shall mean care provided a child in a foster family free or boarding home, group home, agency boarding home, child care institution, or any combination thereof; (b) "child" shall mean a child under the age of eighteen years whose guardianship and custody have been committed to an authorized agency pursuant to section three hundred eighty-four of this chapter by an order of a surrogate or judge of the family court or by a surrender instrument, or whose care and custody have been transferred to an authorized agency by an instrument executed pursuant to section three hundred eighty-four-a of this chapter, or whose custody has

been temporarily or permanently awarded to an authorized agency by a judge of the family court pursuant to a finding that the child is a permanently neglected child as defined in section six hundred eleven of the family court act.

2. Where a child has remained in foster care for a continuous period of eighteen months* a petition to review the foster care status of such child:
(a) shall be filed in the family court by the authorized agency charged with the care, custody or guardianship of such child;
(b) may be filed by another authorized agency having the supervision of such foster care;
(c) may be filed by the foster parent or parents in whose home the child resides or has resided during such period of eighteen months.

In the event that a child in foster care is returned to his parent or parents and, within three months of such return, is again placed under the care of an authorized agency, such period of return shall not constitute an interruption of continuous foster care for the purposes of review pursuant to this section. However, the period of return shall not be considered to be a part of any continuous period of foster care for the purposes of determining the length of time that a child may have been in foster care.

3. Such petition:
(a) shall be filed in the family court in the county in which the authorized agency charged with the care, custody or guardianship of such child has its principal office or where the child resides;
(b) shall set forth the disposition sought and the grounds therefor;
(c) shall, when filed by an authorized agency and notice is to be given to a parent, guardian or relative of the child, omit, for good cause shown,

*The 18 months time period was introduced by amendment in 1975 (Chapter 708), laws of 1975.

the name and address of the foster parent or parents with whom such child is residing at the time of the filing of the petition, and, in lieu thereof, there shall be filed with such petition a verified schedule executed by such agency setting forth the name and address of such foster parent or parents.

4. Notice of the hearing, including a statement of the dispositional alternatives of the court, shall be given and a copy of the petition shall be served upon the following, each of whom shall be a party entitled to participate in the proceeding:
(a) the authorized agency charged with the care, custody or guardianship of such child, if such authorized agency is not the petitioner;
(b) the authorized agency having supervision of such foster care, if such authorized agency is not the petitioner;
(c) the foster parent or parents in whose home the child resided or resides at or after the expiration of a continuous period of eighteen months in foster care;
(d) the parent or guardian who transferred the care and custody of such child temporarily to an authorized agency;
(e) such other persons as the court may, in its discretion, direct.

5. Service of notice of the hearing and the petition shall be made in such manner and on such notice as the court may, in its discretion, prescribe.

6. The court may, in its discretion dispense with the attendance of the child at the hearing or may, with the consent of the parties, dispense with the hearing and make a determination based upon papers and affidavits submitted to the court.

7. At the conclusion of such hearing, the court shall, upon the proof adduced, in accordance with the best interest of the child, enter an order of disposition:

(a) directing that foster care of the child be continued; or
(b) in the case of a child who has been committed temporarily to the care of an authorized agency by a parent, guardian or relative, directing that the child be returned to such parent, guardian or relative; or
(c) in the case of a child who has been committed temporarily to the care of an authorized agency by a parent, guardian or relative, directing that the agency institute a proceeding to legally free such child for adoption, and upon a failure by such agency to institute such a proceeding within thirty days after entry of such order, permitting the foster parent or parents in whose home the child resides to institute such a proceeding; or
(d) in the case of a child whose guardianship and custody have been committed to an authorized agency by an order of a surrogate or judge of the family court or by a surrender instrument or who has been judicially declared to be a permanently neglected child, directing that such child be placed for adoption in the foster family home where he resides or has resided or with any other person or persons.

An order of disposition entered pursuant to this subdivision shall include the court's findings supporting its determination that such order is in accordance with the best interest of the child. If the court promulgates separate findings of fact or conclusions of law, or any opinion in lieu thereof, the order of dispositions may incorporate such findings and conclusions, or opinions, by reference.

8. The court may make an order of protection in assistance or as a condition of any other order made under this section. The order of protection may set forth reasonable conditions of behavior to be observed for a specified time by a person or agency who is before the court and may require

any such person or agency to make periodic reports to the court containing such information as the court in its discretion may prescribe.

9. The court may make an order directing an authorized agency to undertake diligent efforts to encourage and strengthen the parental relationship when it finds such efforts will not be detrimental to the moral and temporal welfare of the child. Such order may include a specific pian of action for the authorized agency including, without limitation, requirements that such agency assist the parent in obtaining adequate housing, employment, counseling, medical care or psychiatric treatment.

10. The court shall possess continuing jurisdiction in proceedings under this section and, in the case of children who are continued in foster care, shall re-hear the matter whenever it deems necessary or desirable, or upon petition by any party entitled to notice in proceedings under this section, but at least every twenty-four months.

New York Social Services Law §411. Findings and purpose

Abused and maltreated children in this state are in urgent need of an effective child protective service to prevent them from suffering further injury and impairment. It is the purpose of this title to encourage more complete reporting of suspected child abuse and maltreatment and to establish in each county of the state a child protective service capable of investigating such reports swiftly and competently and capable of providing protection for the child or children from further abuse or maltreatment and rehabilitative services for the child or children and parents involved.

New York Social Services Law §424. Duties of the child protective service concerning reports of abuse or maltreatment

Each child protective service shall:

1. receive on a twenty-four hour, seven day a week basis all reports of suspected child abuse or maltreatment in accordance with this title, the local plan for the provision of child protective services and the regulations of the commissioner;

2. maintain and keep up-to-date a local child abuse and maltreatment register of all cases reported under this title together with any additional information obtained and a record of the final disposition of the report, including services offered and accepted;

3. upon the receipt of each written report made pursuant to this title, transmit, forthwith, a copy thereof to the state central register of child abuse and maltreatment. In addition, not later than seven days after receipt of the initial report, the child protective service shall send a preliminary written report of the initial investigation, including evaluation and actions taken or contemplated, to the state central register. Follow-up reports shall be made at regular intervals thereafter in a manner and form prescribed by the commissioner by regulation to the end that the state central register is kept fully informed and up-to-date concerning the handling of reports;

4. give telephone notice and forward immediately a copy of reports made pursuant to this title which involve the death of a child to the appropriate district attorney. In addition, a copy of any or all reports made pursuant to this title shall be forwarded immediately by the child protective service to the appropriate district attorney if a prior request in writing for such copies has been made to the service by the district attorney;

5. forward an additional copy of each report to the appropriate duly incorporated society for the prevention of cruelty to children or other duly authorized child protective agency if a prior

request for such copies has been made to the service in writing by the society or agency;

6. upon receipt of such report, commence or cause the appropriate society for the prevention of cruelty to children to commence, within twenty-four hours, an appropriate investigation which shall include an evaluation of the environment of the child named in the report and any other children in the same home and a determination of the risk to such children if they continue to remain in the existing home environment, as well as a determination of the nature, extent, and cause of any condition enumerated in such report, the name, age and condition of other children in the home, and, after seeing to the safety of the child or children, forthwith notify the subjects of the report in writing, of the existence of the report and their rights pursuant to this title in regard to amendment or expungement;

7. determine, within ninety days, whether the report is "indicated" or "unfounded;"

8. take a child into protective custody to protect him from further abuse or maltreatment when appropriate and in accordance with the provisions of the family court act;

9. based on the investigation and evaluation conducted pursuant to this title, offer to the family of any child believed to be suffering from abuse or maltreatment such services for its acceptance or refusal, as appear appropriate for either the child or the family or both; provided, however, that prior to offering such services to a family, explain that it has no legal authority to compel such family to receive said services, but may inform the family of the obligations and authority of the child protective service to petition the family court for a determination that a child is in need of care and protection;

10. in those cases in which an appropriate offer of service is refused and the child protective service determines or if the service for any other appropriate reason determines that the best interests of the child require family court or criminal court action, initiate the appropriate family court proceeding or make a referral to the appropriate district attorney, or both;

11. assist the family court or criminal court during all stages of the court proceeding in accordance with the purposes of this title and the family court act;

12. coordinate, provide or arrange for and monitor, as authorized by the social services law, the family court act and by this title, rehabilitative services for children and their families on a voluntary basis or under a final or intermediate order of the family court.

APPENDIX 4

NEW YORK FAMILY COURT ACT PROVISIONS

New York Family Court Act §611. Permanently neglected child

A "permanently neglected child" is a person under eighteen years of age who is in the care of an authorized agency, either in an institution or in a foster home, and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and

strengthen the parental relationship when such efforts will not be detrimental to the moral and temporal welfare of the child. In the event that the parent defaults after due notice of a proceeding to determine such neglect, such physical and financial ability of such parent may be presumed by the court. For the purposes of this section, evidence of insubstantial and infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child.

New York Family Court Act §651. Jurisdiction over habeas corpus proceedings and petitions for custody of minors

(a) When referred from the supreme court or county court to the family court, the family court has jurisdiction to determine, with the same powers possessed by the supreme court in addition to its own powers, habeas corpus proceedings and proceedings brought by petition and order to show cause, for the determination of the custody of minors.

(b) When initiated in the family court, the family court has jurisdiction to determine, with the same powers possessed by the supreme court in addition to its own powers, proceedings brought by petition and order to show cause, for the determination of the custody of minors.

New York Family Court Act §1012. Definitions

When used in this article and unless the specific context indicates otherwise:

(a) "Respondent" includes any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child;

(b) "Child" means any person or persons alleged to have been abused or neglected, whichever the case may be;

(c) "A case involving abuse" means any proceeding under this article in which there are allegations that one or more of the children of, or the legal responsibility of, the respondent are abused children;

(d) "Drug" means any substance defined as a controlled substance in section thirty-three hundred six of the public health law;

(e) "Abused child" means a child less than sixteen years of age whose parent or other person legally responsible for his care

(i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(iii) commits, or allows to be committed, a sex offense against such child, as defined in the penal law, provided, however, that the corroboration requirements contained therein shall not apply to proceedings under this article.

(f) "Neglected child" means a child less than eighteen years of age

(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care

(A) in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or

(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by using a drug or drugs; or by using alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court; or

(ii) who has been abandoned by his parents or other person legally responsible for his care.

(g) "Person legally responsible" includes the child's custodian, guardian, any other person responsible for the child's care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child.

(h) "Impairment of emotional health" and "impairment of mental or emotional condition" includes a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including incorrigibility, ungovernability or habitual truancy; provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.

(i) "Child protective agency" means any duly authorized society for the prevention of cruelty to

New York Family Court Act § 1031(d) Originating proceeding to determine abuse or neglect

(d) A proceeding under this article may be originated by a child protective agency pursuant to section one thousand thirty-two, notwithstanding that the child is in the care and custody of such agency. In such event, the petition shall allege facts sufficient to establish that the return of the child to the care and custody of his parent or other person legally responsible for his care would place the child in imminent danger of becoming an abused or neglected child.

New York Family Court Act § 1033. Access to the court for the purpose of filing a petition

Any person seeking to file a petition at the court's direction, pursuant to subdivision (b) of section one thousand thirty-two shall have access to the court for the purpose of making an ex parte application therefor. Nothing in this section, however, is intended to prevent a family court judge from requiring such person to first report to an appropriate child protective agency.

APPENDIX 5

NEW YORK DOMESTIC RELATIONS LAW PROVISIONS

New York Domestic Relations Law § 110. Who may adopt; effect of article

An adult unmarried person or an adult husband and his adult wife together may adopt another person. An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may

adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social welfare law.

Adoption is the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect to such other person.

A proceeding conducted in pursuance of this article shall constitute a judicial proceeding. An order of adoption or abrogation made therein by a surrogate or by a judge shall have the force and effect of and shall be entitled to all the presumptions attaching to a judgment rendered by a court of general jurisdiction in a common law action.

New York Domestic Relations Law § 111. Whose consent required

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

(d) Of any person or authorized agency having lawful custody of the adoptive child.

APPENDIX 6

NEW YORK STATE ADMINISTRATIVE REGULATIONS

New York Codes, Rules and Regulations: Title 18,

Rule 4.7 Records and reports. (a) All authorized agencies shall:

(1) maintain current case records for each child in its care, in accordance with the requirements of section 372 of the Social Services Law, which records shall be conveniently indexed and retained until such child becomes 21 years of age; such record shall also include the intake study, the plan of service, plan for discharge and aftercare where applicable, the care and services provided, including social, psychiatric and psychological services, social history of the child and his family, certification of birth, medical and surgical consent from parent or guardian, record of school placement, reports from other agencies, all pertinent correspondence, and periodic progress reports which shall consist of social information, psychological or psychiatric reports, if applicable, medical and dental reports, reports from staff, and aftercare reports;

(2) Maintain a record from which an accurate roll call of all children in care may be readily made;

(3) maintain a record of the names, addresses and dates of visit of every person visiting any child in care; such names and addresses shall be recorded at the time of each visit.

(b) All authorized agencies shall submit to the board reports of admission, transfer and discharge in accordance with the requirements of section 372 of the Social Services Law. Such reports shall be submitted for each calendar month on or before the 10th day of the following month.

(c) A child care agency shall:

(1) report the death of any child in its care to the board, within 24 hours of such death, on a form and in accordance with instructions prescribed by the board;

(2) report to the board within 24 hours any injury to a child in its care which requires the services of a physician if, in his opinion, such injury may cause death, serious disability or disfigurement;

(3) report orally to the board any fire in any facility operated by such agency which involved a fire department, which report shall be made promptly, and then be confirmed by a written report within 10 days.

18 NEW YORK CODES, RULES AND REGULATIONS

Rule 450.2. Eligibility and provision of care and service in child welfare. [Additional statutory authority: Social Services Law, § § 153, 350, 409] (a) Eligibility. The controlling eligibility factor in child welfare is the need of the child for the care and protection provided under law. An integral part of the process of case handling is the examination, evaluation and application of financial resources of legally responsible relatives. However, cases may be accepted for service or care even though financial need is not present.

(b) Intake. The intake study includes all activity from the initial contact at the time of application or referral until a decision is reached as to whether or not the case will be accepted for care or service or until a temporary service is completed. There shall be a record of a purposeful study and evaluation including:

(1) The date, source, and reason for referral.

(2) Information secured to determine the need for service or care. When expenditure of public funds is anticipated, this shall include exploration of financial resources and determination of residence.

(3) A social diagnosis of the case under study, including the strengths and problems found.

(4) A statement of specific services needed to meet the problems presented by the particular case under study as determined by the diagnosis.

(5) The decision reached, whether acceptance for service or foster care, referral to another agency, or non-acceptance, and the reasons therefor.

(6) A clearly defined plan of care or service to the child and his parents in cases for which the agency accepts ongoing responsibility. The plan shall state clearly the kind and degree of responsibility to be assumed by the parents and by the agency and by any other individuals or agencies that may be involved.

(7) Required documents:

(i) form WS-11, Application for Public Assistance or Request for Care;

(ii) form CW-34, Report of Determination to Waive Investigation or Contribution to Support, when applicable.

(c) Cases accepted for foster care. (1) Placement. For children accepted for foster care, the following information shall be recorded:

(i) date, type and location of placement;

(ii) reasons for particular placement chosen;

(iii) plans for maintaining contact of child with his parents, siblings and/or other relatives, or reasons for not doing so;

(iv) the plan for financial support, including a statement that the parents' responsibility to keep the commissioner informed of any change

in their ability to contribute has been explained to them, as well as the commissioner's responsibility to verify information regarding the parents' resources;

(v) the child's legal status as to custody and guardianship;

(vi) required documents:

(a) written authority to place a child in foster care:

(1) for children received from the Family Court, copy of the court order;

(2) for voluntary placements, a form or statement authorizing placement and signed by the parent or guardian. Form WS-11 may be used or the agency may devise a form for this purpose;

(b) written agreement as to support payments, if applicable, or form CW-34. Such agreements are not applicable if the court has made a support order, or if it has been determined that there is no legally responsible relative who is able to pay toward support, or if there has been a determination to waive contribution to support;

(c) birth certificate or verification of birth;

(d) evidence of religious faith—baptismal certificate or parents' signed statement as to the faith of the child;

(e) consent for routine medical care;

(f) authorization for payment for care (form CW-116, Authorization for Payment for Child Care, is available for this purpose);

(g) form CW-1a, Admission of Child to Foster Care, as report of admission to foster care or as authorization to other child caring agency or institution;

(h) for children to be placed in indirect care, a summary to the agency or institution which is to provide care, covering the child's social and developmental history, factors leading to placement, and future plans.

(2) Supervision, all children except those adjudicated neglected. Supervision shall be provided, either directly or by arrangement with the agency that is providing care, for each child accepted for foster care who has not been adjudicated neglected. In each case there shall be clear and recorded evidence of:

(i) Planned and purposeful visits with child as frequently as necessary in relation to need. Visits with children in direct care* shall take place at least quarterly. These may be made in connection with visits to the foster home, but the need of a child to talk with a caseworker alone must not be overlooked. For children in institutional care, visits with the child will depend on whether or not the public social services agency carries any responsibility for casework with the child.

(ii) Planned and purposeful visits as needed but at least quarterly to foster family homes supervised directly by the public social services agency. In relation to children in indirect care,* visits to the agency or institution providing care as often as necessary for adequate correlation and planning of work with the parents and with the child, but at least once a year.

(iii) Planned and regular contacts with parents where appropriate and possible for the purpose of helping them and the child to make the maximum use of placement, evaluating the continued need for foster care, and providing services designed to make possible the child's return to his own home or other permanent plan when necessary.

*Direct care: care under direct control of the social services district provided in a family home. In New York City, direct care includes group care facilities operated by the Department of Social Services.

*Indirect care: care provided at the request of the social services district in a foster home or group care facility of another authorized agency.

(iv) The reasons for any changes in foster care and any major changes in the case plan.

(v) An annual evaluation and plan in terms of case progress, including work with parents toward return of the child, or other permanent plan, relationship with other relatives, reappraisal of resources, and the child's growth and development. Such reevaluation is necessary to validate continuance of foster care and shall be formally approved by the child welfare supervisor. The plan should state specifically how the child's needs for care, training, and/or treatment are to be met.

(3) Supervision, children adjudicated neglected. Supervision shall be provided, either directly or by an arrangement with the agency which is providing direct care; for each adjudicated neglected child accepted for foster care. In each case, there shall be clear and recorded evidence of:

(i) For children receiving foster care in a foster family home or agency boarding home, planned and purposeful visits with such children by the public or voluntary agency providing the direct care. Such visits shall be made monthly provided, however, that such visits shall be made more frequently as the need therefor may arise and may be made less frequently, but at least quarterly, where the child is making a satisfactory adjustment to the foster home and to his total environment, and the foster home is providing the child with a stable environment, presenting no unusual problems. In addition, for children in a foster family home or agency boarding home of a voluntary agency, visits shall also be made to the agency providing such care as often as may be necessary for adequate correlation and planning of work with the parents and the child, but at least once a year.

(ii) For children receiving foster care in a group care facility, including an institution and group home, planned and purposeful visits with

such children. Such visits with the child or a report or conference in his behalf shall be made monthly. Where the public social services agency provides the casework service to the child, visits with the child shall take place at least quarterly, and in the months the child is not visited, a report from or conference with the group care facility is required. Where casework service is provided by the group care facility, a report from or a conference with such facility is required monthly. In addition, there shall be such contact with the group care facility as is appropriate and necessary to provide for correlation and planning of work with the parent and the child, at least once a year.

(iii) Planned and regular contacts with parents where appropriate and possible for the purpose of helping them and the child to make the maximum use of placement, evaluating the continued need for foster care, and providing services designed to make possible the child's return to his own home or other permanent plan when necessary.

(iv) The reasons for any changes in foster care and any major changes in the case plan.

(v) A semi-annual review and evaluation of all factors in the child's family situation and placement plan to determine whether foster care continues to be necessary, and whether continued care in a group care facility or foster family home or an agency boarding home is the most appropriate plan for the child and, for the child in the FC-ADC program, whether he continues to be eligible therefor. Such reevaluation is necessary to validate continuance of foster care and shall be formally approved by the child welfare supervisor. After a child has continued in care for one year, the review and evaluation shall assure that all possibilities for long-range planning for the child have been explored.

(4) Required documents.

(i) Forms DSS-711, Child's Medical Record, and DSS-704, Medical Report on Mother and Infant, in accordance with department policy and instruction;

(ii) Annual reauthorizations for all children in direct or indirect care for whom payment is made. Reauthorizations may be on an individual or a multiple basis but should be based on reevaluation of the need for care;

(iii) Interim authorizations for payment for any changes, such as change in foster care, change of board rate, change in support agreement, discontinuance of financial support or discharge of child. Form DSS-1046 is available for this purpose;

(iv) For all children in indirect care, notification of changes in the placement of the child as they occur during the year; for children not adjudicated neglected and in indirect care, a written progress report from the voluntary agency or institution at least semi-annually; for children adjudicated neglected referred to in 450.3(c) (3) (i) (sic) and in indirect care a written progress report from the voluntary agency at least semi-annually, and for children adjudicated neglected referred to in 450.3(c) (3)(ii) (sic) such report at least annually;

(v) For children in indirect care, an annual reacceptance, Form DSS-832, Reauthorization to Institution or Agency for Care of Child, to the private agency or institution, based upon an evaluation and decision by the public social services agency of the need for continued care and continued expenditure of public funds;

(vi) Form DSS-547, Transfer or Discharge of Child in Foster Care, for children transferred or discharged from direct care; (see Chapter 1312 of Book 13, State Manual of Policies and Procedures);

(vii) Form DSS-891, Change in Financial Responsibility or Guardianship, to report change of guardianship; (see Chapter 1312 of Book 13);

(viii) For children received from the Family Court, copy of the new court order for any extension of placement.

(5) Discharge from foster care. When a child is discharged from foster care, there shall be clear and recorded evidence of:

(i) the date and reason for discharge;

(ii) the name and relationship of the person to whom discharged;

(iii) the plan for the child, including aftercare supervision if indicated;

(iv) required documents:

(a) for children placed or committed by the Family Court, court order of discharge or other evidence of court approval;

(b) termination of authorization for payment;

(c) form CW-1b for children discharged from direct care;

(d) for children discharged to adoption, copy of the court order of adoption or other written evidence of completion of adoption showing date of the adoption order, the judge and the court, and the date and place of filing;

(e) for children discharged to adoption, form CW-1c reporting change of guardianship through adoption.

(d) Cases accepted for service. Cases accepted for service will include children receiving preventive or protective service in their own homes, children supervised in their own homes after a period of foster care, and mothers of children born out of wedlock for assistance in planning for themselves and their children. For such cases there shall be clear and recorded evidence of:

(1) purposeful contacts as frequently as needed according to plan;

(2) evaluation of progress and need for continued service at appropriate intervals in relation to previous plans, but at least semi-annually;

(3) specific agreement with the public assistance division or with other agencies as to division of responsibility for any case carried cooperatively.

(e) Interagency agreements. There shall be written inter-agency agreements as to policy and procedure between the public agency and those private institutions and agencies which are in continuous use as a placement resource by the public agency. Such agreements must recognize the primary legal responsibility of the public agency for the care of the child which includes the duty of the public welfare commissioner to determine initial and continuing need for care at public expense. A child in the care of a private agency or institution should not be discharged from foster care without the approval of the commissioner of public welfare. There should, of course, be joint consideration of the plan for discharge. The guiding principles in the development of inter-agency agreements should be the need for planned services between the agencies, and the avoidance of duplication of activity. These agreements shall be reviewed at least annually and revised as need for change occurs. Where the public agency uses a private agency or institution only intermittently agreements involving respective activities of the public and private agency may be made on the basis of the individual case accepted for care and shall be in written form.

(f) Compliance with law, rules and regulations. There shall be compliance with law, rules of the State Board of Social Welfare and regulations of the State Department of Social Welfare.

18 NEW YORK CODES, RULES AND REGULATIONS

Rule 606.2. Definitions. As used in this part:

(a) Foster care of children means all activities and functions provided relative to the care of a child away from his home 24 hours per day in a duly licensed or certified facility.

(b) Standards of administration for foster care include the following:

(1) intake (study, summary and information, referral, and assisting and arranging for services to prevent foster care);

(2) placement services (development, implementation, and evaluation of placement service plans);

(3) post-placement services (development and implementation of discharge service plans); and

(4) selection, development and supervision of foster care facilities.

[(a)] (c) Foster child means a person under the age of 18 years, or under the age of 21 years if a student attending a school, college or university or regularly attending a course of vocational or technical training designed to fit him for gainful employment, who is cared for away from his home 24 hours a day in a duly licensed or certified facility.

[(b)] (d) Foster family boarding home means a residence owned, leased or otherwise under the control of a single person or family who have been certified by an authorized agency to care for not more than six children, or is used by a local probation department, the State Department of Mental Hygiene, or the State Division for Youth to care for children, and such person or family receives payment from the agency for the care of such children.

[(c)] (e) Institution means a facility established for the (24-hour) care and maintenance of (26 or

more children) 13 or more children operated by a child care agency.

[(d)] (f) Group residence means (a facility established for the 24-hour) an institution for the care and maintenance of (not less than 13 nor more than 25) not more than 25 children operated by an authorized agency.

[(e)] (g) Group home means a [facility for the care and maintenance of not less than seven nor more than 12 children who are at least five years of age, except that a child placed as part of a sibling group may be under five years, operated by an authorized agency.] family-type home for the care and maintenance of not less than 12 children who are at least five years of age, operated by an authorized agency, in quarters or premises owned, leased or otherwise under the control of such agency, except that such minimum age shall not be applicable to siblings placed in the same facility nor to children whose mother is placed in the same facility.

[(f)] (h) [Agency-operated boarding home means a facility established for the care and maintenance of not more than six children, except that six siblings may be placed in the same agency-operated boarding home, operated by an authorized agency in quarters or premises owned, leased or otherwise under the control of the agency.] Agency boarding home means a family-type home for the care and maintenance of not more than six children operated by an authorized agency, in quarters or premises owned, leased or otherwise under the control of such agency, except that such a home may provide care for more than six brothers and sisters of the same family.

[(g)] (i) Children who require special foster care services [shall mean] means:

(1) Children who suffer from pronounced physical conditions as a result of which a physician

certifies that the child requires a high degree of physical care, or

(2) Children who are awaiting family court hearings on PINS or juvenile delinquency petitions, or have been adjudicated as a PINS or juvenile delinquents, or

(3) Unmarried expectant mothers, or

(4) Children who are adjudicated as abused or neglected, or are awaiting a family court hearing on an abuse or neglect petition, or

(5) Children who are family-care patients from the Department of Mental Hygiene.

[(h)] (j) Children who require exceptional foster care services [shall mean] means:

(1) Children who require, as certified by a physician, constant 24-hour a day care provided by qualified nurses, or persons closely supervised by qualified nurses or physicians, or

(2) Children who have severe behavior problems characterized by violence towards themselves, other persons or their physical surroundings and who have been certified by qualified psychiatrists as requiring high levels of individual supervision in the home, or

(3) Children who have been diagnosed by qualified psychiatrists as having severe mental illnesses, such as child schizophrenia, severe mental retardation, brain damage, or autism.

Rule 606.6 Foster family boarding home program—payments and State reimbursement.

(a) Each social services district shall establish and submit to the department annually a schedule of rates which it shall pay to foster family boarding homes for foster care service provided to children; however, State reimbursement on payments for such care based upon such rates shall be limited to the maximum provided for in subdivision (b) of this section.

(d) [sic.] State reimbursement shall be made only on actual payments to certified foster parents providing care for children in foster family boarding homes up to the maximum levels established by the department based upon data published by the U.S. Bureau of Labor Statistics, and other generally accepted sources, relating to the cost of raising a child in a family of four with a moderate standard of living.

(c) In the case of children who require special foster care services, State reimbursement shall be made only on actual payments to certified foster parents providing care for children in foster family boarding homes. However, in no case shall reimbursement be made on payments that exceed one-third of the average, as established by the department, of the Statewide cost of institutional care provided by authorized agencies.

(d) In the case of children who require exceptional foster care services, State reimbursement shall be made only on actual payments to certified foster parents providing care for children in foster family boarding homes. However, in no case shall State reimbursement be made on payments that exceed one-half the average Statewide cost, as established by the department, of institutional care provided by authorized agencies, or, where the child cannot be cared for in such institutions, one-half the average cost of the hospital or nursing home care which would be necessary if foster care were not provided.

(e) Where certified foster parents are providing care for a child in a foster family boarding home on October 1, 1974 and are receiving payment for such care in excess of the maximum level of payment approved by the department for the type of care provided, State reimbursement shall continue to be made on the excess payment for so long as the child continues to receive care in that foster family boarding home.

(f) State reimbursement through the Department of Social Services shall not be available for foster care or for bed reservations in any foster family boarding home during any period in which a child is being held therein for detention as defined in a section 510-a of the Executive Law.

Rule 606.12 Maintenance of case records. A case record shall be maintained for each child who received any foster care services as a public charge, and who has not been placed directly in a foster care facility by a court. Each such record shall document compliance with the applicable provisions of this part. Official documents, required forms and reports and other essential data including, but not limited to birth, religion, health, finances, and court orders shall be included in the record.

Rule 606.13 Eligibility. The only eligibility factor for foster care and foster care services is the need of the child for care and protection.

Rule 606.14 Intake.

(a) An intake study to determine the need for foster care shall be conducted for each child with respect to whom the local department has received a referral or an application for foster care services. This study, which includes all activity from the time of that application or referral until a decision is reached as to whether the case will be accepted for foster care or other service or assistance or until a temporary service is completed, shall continue until the relevant data required in subdivision (b) of this section is in as adequate form as possible, but in no case for more than 90 days. When expenditures of public funds is anticipated, the study shall include exploration of financial resources and determination of residence.

(b) While the intake study is being conducted, a summary thereof shall be prepared. (1) Within 30 days after the intake study is begun, a preliminary summary shall be made detailing the activities which have occurred, which shall include, but shall not necessarily be limited to:

(i) the specific and immediate problems which appear to require replacement.

(ii) the underlying relationship patterns within the family.

(iii) the strengths in the child and his family.

(iv) the possibilities for stabilizing the family situation in order to obviate the need for placement.

(v) identification of the assistance or services, which, if provided, could reasonably be expected to obviate the need for placement.

(vi) an estimate of whether the preferred services or assistance are available, and how they can best be provided.

(vii) an alternative plan if the preferred assistance or services be provided.

(viii) an estimate of the amount of time required to ameliorate the conditions leading to the need for placement.

(ix) a determination as to whether the child can be left with the family in reasonable safety while efforts are made to correct the problem.

(x) if placement is necessary, a statement as to the kind of placement indicated and how it is to be accomplished.

(xi) names and dates of all contacts.

(2) Upon completion of the intake study, a final summary shall be made, which shall set forth, in detail, the information required in paragraph (1) of this subdivision, and shall conclude with a decision to:

(i) close the case as not in need of further service,

(ii) transfer the case to another agency or unit which will provide assistance or services other than foster care, or

(iii) accept the child into foster care.

(c) Information, referral, and assisting and arranging for services to prevent foster care. During the Intake Study, the local department, in order to enable the family to remain together by obviating the need for foster care, shall provide each family with:

(1) a full explanation of foster care services, including the respective obligations of parents and agencies;

(2) information about other services or assistance which may be alternatives to placement;

(3) assistance in applying for services for which they are eligible, and ascertaining whether those services are being provided;

(4) counseling; and

(5) referral for and help on obtaining assistance and services from other agencies and other units within the local department.

Rule 606.15 Placement Service Plan.

(a) A clearly defined placement service plan shall be recorded in the local social services district's case record. A tentative plan outlining immediate action to be taken must be completed at the conclusion of the intake study, with additions of intermediate and long-term goals and changes in the plan recorded as appropriate, including at least a semi-annual evaluation. The service plan shall include:

(1) special, time-limited, realistic goals. Goals shall be defined on three levels: short-term, intermediate, and long-term. (i) Short-term goals should be established for no more than a three-month

period. The most urgent problems are to be identified, steps to be taken to meet them outlined, and a time established for achieving the goal.

(ii) Intermediate goals involved tasks and activities which can be expected to be achieved within no more than a six-month period.

(iii) By at least the end of one year, a long-term goal must be established. The long-term goal shall be either return of the child to relatives, placement for adoption, providing appropriate care for the period necessary to assist the child to achieve independent living, or if he is in need of continued care beyond his minority, arranging for his transfer to a suitable agency. Plans for maintaining familial contact or reasons for not doing so shall be specified.

(2) identification of the services required by both the child and his family. Where needed services are not available, the reasons why shall be stated, and a description given of the services which will actually be provided.

(3) description of the methods through which the needed services are to be provided, including the type and location of placement. Responsibilities of agency, parents, and any other persons or agencies involved shall be clearly described.

(4) the plan for financial support, including a statement that the parents' responsibility for keeping the commissioner informed of any change in their ability to contribute and the commissioner's responsibility to verify information regarding the parents' resources has been explained to them.

(b) The case record shall set forth the specific steps which are taken to implement the service plan. It shall be shown that the child is receiving adequate supervision in his placement and that the child and family are receiving those services which are judged to be necessary to make possible a

permanent plan for the child. The following services shall be provided:

(1) Within the first two weeks of placement:

(i) Parents shall be contacted (unless it is documented that they are not available) to determine their current situation and their reaction to the child's placement; services, including at least counseling services, shall be offered to assist them in correcting the conditions leading to placement and to participate in the child's placement.

(ii) Arrangements shall be made for frequent contact between parents, other relatives and the child, unless compelling reasons are recorded why such contact is not possible or desirable, such as when a surrender is contemplated and the parent does not wish to maintain contact. Dates of contact shall be recorded.

(iii) The child shall be interviewed or visited to determine his reaction to separation and his adjustment to the foster care placement; arrangements shall be made for any services necessary to meet his needs, such as psychiatric care or special education.

(iv) The social worker assigned to the child's case shall obtain information as to the child's adjustment through personal contacts with those immediately responsible for his day-to-day care.

(3) During the first three months of placement:

(i) Counseling interviews shall be held with the family at least every two weeks, unless compelling reasons are recorded why such contacts are not possible or desirable.

(ii) The child shall be interviewed or visited every two weeks, unless compelling reasons are recorded why such contacts are not possible or desirable. In no case shall visits be made less frequently than every three months.

(iii) The social worker assigned to the child's case shall obtain information as to the child's adjustment at least every two weeks through personal contacts with those immediately responsible for his day-to-day care.

(iv) Arrangement shall be made for the provision of other services called for by the placement service plan.

(3) During the fourth through twelth month:

(i) Contacts shall be made with the family as needed to execute the plan of service, but in no case less than monthly without documented reasons.

(ii) The child shall be interviewed or visited at least monthly unless compelling reasons are recorded why such contacts are not possible or desirable.

(iii) The social worker assigned to the child's case shall obtain information as to the child's adjustment through personal contacts with those immediately responsible for his day-to-day care as indicated by the service plan, but in no case less frequently than every three months.

(4) Following the first year of placement: the placement service plan shall be re-evaluated, as provided in subdivision (c) of this section.

(5) Counseling services to the child and family shall continue during the following 12 months as indicated by the placement service plan. Other services shall, if appropriate, continue as well. There shall be monthly contacts with the child and at least quarterly contact with those immediately responsible for his day-to-day care.

(6) During subsequent years of placement contacts must be made as required by the placement service plan, but in no case shall contacts with the child and those immediately responsible for his day-to-day care occur less than quarterly.

(7) Visits shall be made to all agencies from which care is purchased as frequently as necessary for adequate correlation and planning of work with the parents and child, but at least once a year.

(c) All adjustments in the service plan are to be recorded as they occur. (1) A re-evaluation of the plan shall be recorded as six-month intervals. The six-month evaluation must include:

(i) the establishment of new or additional goals, if applicable.

(ii) a summary of the services provided and their effect upon the case situation, and

(iii) a redetermination of the need for continued foster care.

(2) Payment for care shall be authorized annually.

(3) By the end of the first year, the long-term goal should be clearly delineated and the steps necessary for its attainment clearly specified.

Rule 606.16 Discharge service plan. (a) When it is determined that within the next six months, a child is to be returned to relatives, placed for adoption, helped to make arrangements for independent living, or discharged to an agency which will be responsible for his continued care, a discharge service plan shall be developed. The plan shall clearly state to whom the child is to be discharged, where responsibility for the child will lie, what services are to be provided prior to and following discharge and how they are to be provided.

(b) Implementation of the discharge service plan begins prior to the time of discharge with interviews with the child, his family, and other individuals or agencies involved in the plan to identify possible problems, evaluate the readiness of all parties to participate in the plan, and arrange for

the services identified in the discharge service plan. It shall include arranging for the physical transfer of the child, and for a period of not more than six months in those cases where a child is discharged to relatives or his own responsibility, shall also include (1) providing or arranging for services specified in the discharge service plan, (2) maintaining contact with or supervision over the child or his family, and (3) providing counseling to the child or family in order to prevent the need for replacement.

Rule 606.17 Purchase-of-service agreements. Each purchase-of-service agreement for foster care executed by a local social services department shall require the authorized agency to provide services as defined and required in this part and to maintain records and submit reports in the manner and form required by the local social services department.

Rule 606.18 Implementation. By September 1, 1976, each social services district shall submit a plan for an orderly implementation of these regulations. This plan may extend over the next two years, but shall provide for full implementation of the regulations by January 1, 1979.

If a local social services district wishes to postpone full implementation of the required schedule of visitation during the first two years of placement (606.16(b)(1)-(5)) because fiscal restraints prevent the appointment of adequate staff, it may appeal to the Department for an exception. The following information shall be provided in such a request for exception:

(a) the casework staff assigned to the supervision of children in foster care and the caseloads carried by those workers,

(b) the estimated number of additional staff needed to comply with the visiting schedule as outlined in 606.15,

(c) the schedule of visits which is currently maintained for both the child and the family during

(1) the first 3 months of placement

(2) the subsequent 21 months of placement

(d) the steps which the agency is taking to assure that appropriate services are being provided to all children in care and for their families as indicated.

Within 20 working days of receiving such an appeal, the Department shall notify the district that

(a) the appeal is approved for a period of time not to exceed 2 years,

(b) the appeal is approved, subject to certain conditions which the Department shall specify, or

(c) the appeal is denied and the district must implement the regulations.

Section 450.2 is hereby repealed.

APPENDIX 7

NEW YORK CITY ADMINISTRATIVE PROCEDURES

PROCEDURE FOR REMOVAL OF CHILDREN FROM FOSTER FAMILY CARE

August 5, 1974

TO: Executive Directors, Voluntary Child Caring Agencies

FROM: Carol J. Parry, Assistant Administrator Special Services for Children

SUBJECT: Removal of Children From Foster Family Care
SSC Procedure No. 5 –
August 5, 1974

Enclosed are copies of the above named procedure which required the use of a new Exp. Form FC-6.

You will note that the model Exp. Form FC-6 bears the letterhead of Special Services for Children. Each agency should use the identical text on its own letterhead in accordance with the procedure.

Enc. (2)

THE CITY OF NEW YORK–HUMAN RESOURCES ADMINISTRATION

DEPARTMENT OF SOCIAL SERVICES – SPECIAL SERVICES FOR CHILDREN

SUBJECT: REMOVAL OF CHILDREN FROM FOSTER FAMILY CARE

SSC PROCEDURE NO. 5

TO: Executive Directors, Voluntary Child Caring Agencies Staff, Special Services for Children

August 5, 1974

I. INTRODUCTION

In recognition that there are considerations of due process which should be protected in removal of children from foster family homes, and at the same time bearing in mind that the Commissioner of Social Services has the duty and responsibility to provide care and services for children who are public charges which are in their best interests, the following procedural changes within the framework of Social Services Law Section 400 and SDSS Regulation 450.14 are to be instituted prior to the removal of a child from a foster home. *These changes do not apply when a child is being discharged to his own family home*, in which case

the procedural instructions outlined in Appendix A, attached, shall be followed. They also do not apply when the health and safety of a child are endangered. In such a case the child should be removed immediately. The instructions below, which provide for an Agency Conference and an SSC Independent Review, *do* apply to children in both Voluntary Agency or SSC Directly Operated Programs who have been placed in boarding homes under a plan for long-term care, or who have remained in shelter boarding homes for a period of one year or more, and are relevant to situations where a child is being transferred to another boarding home, to another child care facility, or to an adoptive home.

II. DETAILED INSTRUCTIONS

A. Notice of Intention to Remove a Child From a Foster Home

1. Sound casework practice should include home visits with foster parents whenever removal of a foster child from their home is being considered. In such visits the reasons for the plan should be interpreted to the foster parents so that they be afforded an opportunity to discuss the situation and cooperate in carrying out the plan. Such visits and discussions should take place as early as possible so that both the foster parents and children may be well prepared for any change.
2. If the ultimate casework decision is to proceed toward removal of the child from the foster home in situations where the imminent health and/or safety of the child is not involved, or where removal is *not* for the purpose of returning the child to his own family home, the Voluntary Agency caseworker shall

prepare a Notice of Intention to remove a Child from a Foster Home, Form Exp. FC-6, quintuplicate; the SSC case worker shall prepare the form Exp. FC-6, in quadruplicate.

3. If the foster parents are being formally advised during a home visit of the decision to remove the child, the caseworker should have available the above prepared Form Exp. FC-6 with the reasons for the decision stated thereon. After discussion and interpretation, which include the alternatives of an Agency Conference and/or Independent Review to which he is entitled, the worker shall provide the foster parents with a dated original and one copy of the Form.
4. The foster parents should be informed of the need to express their reaction to the plan for removal of the child by checking the appropriate boxes on the Form Exp. FC-6, which can then be returned to the caseworker at the time of the visit. Upon return to the office, an SSC caseworker will date the third and fourth copies of Form Exp. FC-6, filing the third copy in the case record and, if the foster parents are not in agreement with the plan, forward the fourth copy to the SSC Independent Review Team Supervisor. A Voluntary Agency caseworker will similarly date his third, fourth, and fifth copies and forward the third copy to the SSC IARP Team, and if the foster parents do not accept the plan, forward the fourth copy to the SSC Independent Review Team Supervisor, and file the fifth copy in the agency case record.
5. If the foster parents have no objection to the removal of the child, the caseworker shall request them to execute the waiver on Form Exp. FC-6 and discuss with them arrangements for removal of the child. The Voluntary Agency should forward one

copy of the Form to the IARP Team, a second copy to the SSC Independent Review Supervisor.

6. If the foster parents do not wish to execute the waiver and/or oppose the removal of the child from their home, the caseworker shall explain the processes of the Agency Conference and Independent Review options available to them, as well as their option to subsequently execute the waiver at any stage of the Agency Conference and/or Independent Review, and impress upon them the urgency of making immediate arrangements for the scheduling of such a Conference and/or Independent Review. An Agency Conference, if desired, must be held within *5 days* of the date of the Notice on Form Exp. FC-6. The foster parents should therefore be helped to state their request or to complete the appropriate boxes on the Form at the time of the caseworker's visit and delivery of the Form to them. If they are unwilling or unable to do this at that time, they should be advised to telephone the caseworker within 48 hours of the date of the Notice if they wish an Agency Conference, in view of the narrow time frame involved. An Independent Review must be requested within *10 days* from the date of their request for one. The foster parents should be advised that the time frames above will be strictly adhered to.
7. If the foster parents indicate that they wish to request an Agency Conference and/or Independent Review at the time of the caseworker's visit, their complete copy of the Notice on Form Exp. FC-6 should be accepted from them. If they are requesting an Independent Review at that time, or may request it later, they must be advised to make the required telephone request to the SSC Independent Review Supervisor within 10 days of the date of the Notice on Form Exp. FC-6.

8. If for any sound reason the notification of the decision for removal is not delivered during the course of a home visit, the prepared original and the copy of Form Exp. FC-6 shall be mailed to the foster parents, dated as of the date of mailing.
9. At any stage of the foregoing procedure, the foster parents may give an informed written waiver of their right to an Agency Conference and/or Independent Review and return the child to the Voluntary Agency or SSC Direct Care Program.

B. The Agency Conference

1. When indicated during the home visit, or following the receipt of a phone call from the foster parents requesting an Agency Conference, the SSC or Voluntary Agency caseworker or supervisor shall advise the foster parents of the time and place of the Conference, that the purpose of the Conference is to review the basis for the decision with the foster parents only, and that no other representative will be allowed to attend. The date of the Conference shall be set within five days of the date of the notice on Form Exp. FC-6 to the foster parents.
2. The conduct of the Conference shall be held in accordance with casework principles and concepts, (as distinct from the legal concept of "due process" which applies in the Independent Review), with the foster parents given full opportunity to express their objections to the removal of the child and the reasons therefore. A complete summary of the Conference shall be entered in the case record with a Voluntary Agency preparing a copy for forwarding to the SSC IARP Team, and another copy for presentation at the time of the hearing should an Independent Review also be requested.

C. The Independent Review

1. Upon receipt of a phone call from the foster parents by the Independent Review Supervisor requesting an Independent Review, the Supervisor shall determine if a Conference at the Agency had been requested and if the foster parents intend to be represented at the Review. An Independent Review must be requested within 10 days of the Notice on Form Exp. FC-6 and be scheduled within 10 days of the date of the request by the foster parents. The Independent Review Supervisor shall notify the SSC Direct Care Unit, or the Voluntary Agency and the appropriate IARP Team of the date and time of the scheduled hearing and request they be present and be prepared to present their position and any supporting evidence. A copy of the dated notice on Form Exp. FC-6 returned by the foster parents shall be delivered to the Independent Review Supervisor within 48 hours. If the foster parents indicate their intention to be represented by Counsel, the Independent Review Supervisor shall advise the HRA Office of Legal Affairs in writing of the time and place of the Review so that Counsel may participate. If two agencies are involved, one the agency carrying family case planning responsibility, the other the agency providing the foster care to the child, both must be included and participate in the planning and decision.
2. The Independent Review shall be conducted by the Independent Review Officer of SSC in accordance with the concepts of due process, in that:
   a. The Review shall be heard before an SSC official on a supervisory level who has had no previous involvement with the decision to remove the child. (The only information appropriate for the Reviewer to possess prior to the conduct of the

Review is a copy of Form Exp. FC-6, Notice of Intention to Remove a Child from a Foster Home, given to the foster parents, including the basis for the foster parents' objections thereon, and the date of the scheduled hearing);

b. The foster parents may be represented by Counsel and have the right to present witnesses and other evidence on their behalf;
c. The SSC Direct Care Unit or the Voluntary Agency and the appropriate IARP Team, as the case may be, shall be present, have the right to present testimony and evidence in support of their decision to remove the child, and be represented by Counsel;
d. Witnesses may be cross-examined, and all evidence presented is subject to review by all parties;
e. There shall be a tape recording or stenographic record of the Review and the foster parents shall be entitled to a copy or transcript thereof, upon request and payment of the cost for duplication;
f. The Reviewer shall render a *written* decision within five work days after the Review setting forth the decision and the reasons therefore, and shall advise the foster parents of their right to a State Fair Hearing;
g. The decision in writing shall be mailed to the foster parents and to their Counsel if they are so represented.

3. All persons other than the parties (foster parents, SSC Direct Care Program worker and supervisor, Voluntary Agency worker and supervisor, and IARP Team representative) and their Counsels shall be excluded from the Review Room unless giving testimony. All witnesses shall be sworn, except that parties may stipulate that the testimony is deemed as being given under oath.

4. The SSC Direct Care Program representative, Voluntary Agency representative, or SSC IARP representative shall present their case in support of the removal of the child from the foster home first. The foster parents shall thereafter present their case in support of their objection to this decision. All witnesses shall be subject to cross-examination. *If any portion of, or report contained in, a case record is to be used in support of the case for removal of the child, the Reviewer is required to allow the Counsel for the foster parents to also review such report or portion of the case record.* Copies of this documentation or evidence should be duplicated for presentation to the Independent Review Supervisor.
5. Within five days after the completion of the Independent Review, the Reviewer shall render a written decision based upon the evidence and testimony received at the Review, whether to affirm the decision to remove the child, or to disapprove such removal. The decision shall set forth the facts relied upon in reaching such decision, and if the decision is to affirm the removal of the child shall advise the foster parents of their right to request a State Fair Hearing pursuant to Section 400 of the Social Services Law. Copies of the Independent Review decision shall be forwarded to the Directors of the Bureau of Child Welfare and the SSC IARP Program. The decision of the SSC Independent Review Supervisor is binding on the Child Caring Agency.
6. The Independent Reviewer shall also mail copies of the written decision to the foster parents and their Counsel if represented, as well as to the SSC Direct Care Program and/or Voluntary Agency and IARP Team. In addition, the Reviewer may, if so desired, elect to notify the parties by telephone.
7. If the Independent Reviewer affirms the decision to remove the child from the foster home, the child

shall not be removed for at least three days after written notice of the written decision is mailed to the foster parents, or prior to a proposed effective date of removal, whichever occurs later.

TO: Date:

Notice of Intention
To Remove A Child
From A Foster Home.

Dear

The care and attention you have given to foster child(ren) in your home is greatly appreciated. This has been a service not only to the child(ren) but to the entire community. To continue to plan for

_____ _____

_____ _____

we now consider it in (his) (her) (their) best interest(s) to leave your home on or about (date) _____.

The plan for the child(ren) is to:

☐ place (him) (her) (them) in another foster home or other appropriate facility because _____
_____
_____
_____

☐ place (him) (her) (them) in an adoptive home because _____ _____
_____
_____
_____

If you have no objection to the removal of the child(ren) from your home, please indicate this by signing the waiver on page two and return it to your caseworker immediately.

However, if you have any objection to the removal of the child(ren) from your home, you may request an Agency Conference with your caseworker and supervisor, which shall be held within five (5) days from the date of this notice, at which time you may present your reasons for objecting to the child(ren)'s replacement. Please telephone immediately if you desire such a conference. Indicate your objections by checking the appropriate box on the reverse page, and return it to your caseworker.

You may also request an Independent Review within ten (10) days of the date of this notice, in addition to or instead of the Agency Conference. This Independent Review will be held at the Department of Social Services, Special Services for Children office within ten (10) days from the date of your request, at which time you may be represented by an attorney or other representative and present witnesses and other information you consider important. You also will be able to question the Agency's witnesses. Please call _____, SSC Independent Review Team Supervisor, at _____ immediately, if you desire such a review and state whether you expect to be represented. You should also indicate your objection below and check the appropriate box on this letter and return it to your caseworker.

If we do not hear from you within ten (10) days, we will assume that you have accepted the plan and proceed with the child(ren)'s replacement.

Very Truly yours,

Caseworker

☐ I have no objections to the removal of the foster child(ren) from my home and agree to return the child(ren) to the Agency.
☐ I object to the removal of the child(ren) from my house because

_____

_____

_____

☐ I desire a conference with my caseworker and supervisor.
☐ I desire both a conference and independent review.
☐ I desire an independent review instead of a conference.
☐ I expect to have a representative present at the review.

Dated: _____ Foster Parent(s) _____

_____

PLEASE NOTE: IF YOU OBJECT TO REMOVAL OF THE CHILD(REN) FROM YOUR HOME, YOU ARE ENTITLED TO A STATE FAIR HEARING, IN ADDITION TO THE AGENCY CONFERENCE AND INDEPENDENT REVIEW. HOWEVER, THE CHILD(REN) MAY BE REMOVED FROM YOUR HOME, FOLLOWING THE INDEPENDENT REVIEW, IF THAT IS THE INDEPENDENT SUPERVISOR'S DECISION.

Exp. Form FC-6
Aug., 1974

THE CITY OF NEW YORK –
HUMAN RESOURCES ADMINISTRATION
DEPARTMENT OF SOCIAL SERVICES –
SPECIAL SERVICES FOR CHILDREN

SSC PROCEDURE NO. 21
February 18, 1976

SUBJECT: VOLUNTARY PLACEMENT AGREEMENTS

TO: Executive Directors,
Voluntary Child Care Agencies
Staff, Special Services for Children

FROM: Carol J. Parry,
Assistant Commissioner
Special Services for Children

I. INTRODUCTION

The purpose of this procedure is to present new criteria and guidelines for accepting Voluntary Placement Agreements from parents or guardians and to introduce concomitantly a revised more relevant Agreement Form W-864 (11/13/75) to comply with the requirements of the new Section 384a of the Social Services Law.

Special Services for Children had been concerned for some time over the content of its Placement Agreements and the manner by which they were being obtained. Despite a number of revisions of the form, it had never completely kept pace with the increasing recognition by the various Courts and the professional child welfare field of the rights of parents and children in foster care. The enactment of Chapter 710 of the Laws of 1975 by the New York State Legislature amended various relevant sections of the Social Services Law and now makes it necessary for SSC to immediately modify its practice and Placement Agreement to conform with the new mandates, as well as to be more compatible with current child welfare philosophy. (See memorandum of October 15, 1975 on "Critical Changes Affecting Voluntary Placement (W-864) of Children in Foster Care" from Carol J. Parry to Voluntary Agencies and SSC Staff.) A Task Force of SSC operational and administrative staff evaluated a number of Placement Agreements used by other communities; prepared, discussed, and revised a number of draft forms; and finally developed the attached Form W-864 (Rev. 11/13/75) as most suitable for our use.

The format is that of a contract between the Commissioner and the parents or guardian of a child in which permission is given to the Commissioner to place

the child. It stresses the mutual and differential responsibilities carried by both in the foster care process. It removes the reference in the previous agreement to the parents' inadequacy to carry out the parental role, phraseology that was so difficult for many parents to accept and often an obstacle to obtaining an Agreement. It emphasizes the parents' right to have the child returned to them upon written request, unless contrary to a Court Order. It eliminates the "waiver clause" (Item 4) which was frequently ignored by most judges because of its dubious constitutionality. It moves the reference to a possible consequence of a permanent neglect finding in the event of irregular contacts or failure to support when able (Item 2), from the body of the Agreement, (implying consent by the contracting parties, when actually it is a statement of the law) to a less threatening context of an appending informational "Note" on the Form. It provides for an adjunct informational pamphlet, "The Parents' Handbook," to accompany the parents' copy of the Agreement, to confirm the content of the caseworker's discussion with them about the meaning, rights and obligations involved in the foster care process, and to be available to them for future reference. The parents are also given a copy of Form W-864V, "Request for Discharge of Child From Foster Care," as a convenient mechanism upon which to make their written request for such purpose when they are ready and so desire to use this form.

II. HIGHLIGHTS OF NEW SECTION 384a SSL IN CHAPTER 710

1. *Only parents and legal guardians* can enter into voluntary placement agreements—on or after November 7, 1975 such an agreement cannot be accepted from a relative within the second degree or any other

person even if that person has the physical custody of the child.

2. A child placed under a Voluntary Placement Agreement taken *on or after November 7, 1975* must be returned to the parents or legal guardian within ten days of the receipt of a request for discharge in writing or in person, unless a Court order secured by SSC and/or a voluntary agency permits retention of custody.
3. Because of the implications of Item 2 above, a Voluntary Placement Agreement should not be taken where there is any indication of actual abuse or neglect. Where this determination cannot be made clearly, or cannot be sufficiently supported for a court procedure, a Voluntary Placement Agreement may be taken. However, it should be borne in mind that such a child would have to be discharged within 10 days of a parent's request. Such situations must be highlighted for the agency which will accept the child for care so that the family situation may be closely monitored for the proper protection of the child in the event a request for discharge is made in the future.
4. When a child living with relatives or unrelated persons is found to need placement, it is necessary to locate the parent or legal guardian to obtain their Voluntary Agreement as the Family Court will not accept "Petition for Custody" in this situation under the current statute; nor will the Court entertain a Section 358a Petition where a Voluntary Agreement is signed by other than a parent or legal guardian. New legislation is being proposed in the 1975 Legislative Session to remedy the above situation.

III. GENERAL INSTRUCTIONS

A. Possible Child Abuse or Neglect Situations

1. A planning caseworker shall not accept a Form W-864, Voluntary Agreement, from an available parent or guardian when the initial survey in the diagnostic study reveals the possibility of child abuse or neglect; regardless of whether the situation came to SSC's attention through a report to the Central Registry, by other source of referral, or by personal application; and, even if the parent or guardian desires removal of the child from the home and is willing to sign a Voluntary Agreement. If such a situation has not already been reported to the Central Registry, the caseworker shall make a report immediately.
2. Where the completion of the diagnostic study finds that child abuse or neglect is "indicated," the caseworker shall consider the advisability of immediate removal of the child or children from the home where the child is in danger, and if advisable and necessary, immediately initiate proceedings in the Family Court in accordance with existing SSC Procedure No. 3.
3. Where the determination of abuse or neglect cannot be made clearly, or cannot be sufficiently supported for a Court proceeding, Form W-864 may be taken from the parent or guardian. However, such situations must be highlighted for the agency in which the child will be placed so that the family situation can be closely monitored for the proper protection of the child in the event a request for discharge is made in the future.
4. When a study indicates the need for placement, and there is no parent or legal guardian available from whom to obtain a Voluntary Placement Agreement, careful consideration must be given to the possibility of initiating a neglect or abandonment petition

against the absent parent in the Family Court as the basis for effecting the placement. Should the DSS Office of Legal Affairs inform us that the current circumstances could not support such a petition, it will be necessary (at this time until the legislation is amended) to proceed with the placement of the child under the Commissioner's responsibilities, powers, and duties as given him in Sections 395 and 398 of the Social Services Law, for the protection and care of the child.

B. Non-Child Abuse or Neglect Situations

Where the diagnostic study determines that foster care is the best plan for a child, and a parent or guardian is available and in agreement with such a plan, the planning caseworker shall:

1. Present the W-864 to the parent to be carefully read. Spanish speaking parents should be informed of the Spanish version on the reverse side of the form and be assured that it is a true equivalent of the English version.
2. The caseworker should explain the agreement as resembling a contract which delineates the respective responsibilities to be carried by both the Commissioner and the parents while the child is in care so that the experience can be the most constructive possible for both the parents and the child.
3. It is important that the agreement be discussed with the parents, paragraph by paragraph, to insure that the parents are informed of and understand their responsibilities and rights. This is particularly essential when a parent cannot read well or is not well versed in either English or Spanish. This discussion should emphasize:
   a. the parents' right, responsibility, and need to participate with the agency in the planning for the child so that he may be able to be returned home

as early as possible or perhaps moved to a permanent home;
   b. that regular visiting and communication with the child is important both to the child and the parents and in regard to the child's adjustment in care and the planning for him. (See SSC memorandum of September 16, 1975 to Voluntary Agencies and SSC Staff, "Policy Statement on Parental Visiting");
   c. that the parent has an obligation to contribute to the cost of foster care in accordance with their ability as determined by SSC Procedure No. 1. This requires that the parents keep the agency always informed of the current place of employment, changes in income, and living arrangements;
   d. that it is important for the agency to be always kept informed of the parents' whereabouts so that they may always be reached when needed for purposes of planning, medical emergencies, etc.;
   e. that the parents understand that they are agreeing to the administration of routine medical treatment, but they will always be consulted whenever serious medical procedures or surgery may be required, and that they are authorizing the Commissioner to consent to such emergency procedures or surgery if for any reason they are unavailable for such consultation;
   f. that the parents have the right to have the child returned home within a specific time limit upon written request, unless this would be contrary to the obtainment of a Court order. The parents should be advised that they are receiving a copy of Form W-864V, Request for Discharge, which will be attached to their copy of the Agreement and available for their use when ready to make their written request. It should be explained that a request for discharge must not necessarily be made on this form, but can also be made in person. However, the form is a very convenient method

for them to make their request and asks, the information that is needed from them. Additional copies of the form can always be obtained from SSC upon their request;

g. that if the parents have any complaint about the care and services provided, this should be discussed with the agency and that the "Parents' Handbook" (see Item 4, below) gives instructions as to how this can be done.

4. The parents shall be given a copy of the "Parents' Handbook." The caseworker should use this Handbook as an adjunct resource for the explanation of the Agreement to the parents. They should understand that the Handbook clarifies the content of the Agreement which can be reviewed by them at any time in the future for renewed understanding of their rights and responsibilities or to obtain information about what to do about any problems they may have.
5. The caseworker should also bring to attention the "Additional Information" section appended to the Agreement and interpret the meaning that the statutory provisions could have to them. They should also be advised that the Handbook provides a fuller discussion of this, and of other Court procedures that may be relevant to their particular situation.
6. The parents should be encouraged to raise any questions they may have so that clarification can be given at this point in time. When all questions have been clarified sufficiently and the caseworker is satisfied that the parents are aware of the meaning of the Agreement for them, they should be asked to sign Form W-864 appropriately completed, in quadruplicate, one set for each child for whom foster care is being recommended. The caseworker taking the Agreement shall then sign each copy of the form as witness to the parents' signatures. The fourth copy of the Agreement shall have attached to it a Form W-864V, "Request for Discharge of Child from

Foster Care" and be given to the parent with a copy of the "Parents' Handbook." The remaining three copies shall be filed in the case record, the original copy to remain in the record, the other two to be available for processing when needed.

A Voluntary Agency taking an Agreement for the "additional commitment" of siblings of a child in care may elect to prepare the Agreement in quintuplicate, retaining the fifth copy for their record and forwarding the original and two copies to its SSC Accountability Team.

7. Where a study of a child living with relatives or unrelated persons determines need for placement, but no parent or legal guardian is available from whom to obtain a Voluntary Placement Agreement, under current statute it is not now possible to enter into such an agreement from the persons having physical custody. Neither is it possible for the Court in such situations to accept a "Petition for Custody" from the Commissioner under the present Family Court Act unless there is provable evidence of neglect or abandonment (see Item A, 4). If there is no basis for a neglect or abandonment action against the parent, and/or where in the opinion of the DSS Office of Legal Affairs a wait of six months would be necessary to establish abandonment, if immediate foster care is indicated, and until the legislation is amended, it will be necessary for SSC to proceed with the placement for the protection of the child, under the Commissioner's responsibilities, powers, and duties assigned in Sections 395 and 398 of the Social Services Law. When a child is placed under such circumstances, it is important that the planning unit and/or child caring agency immediately institute and maintain diligent efforts to locate the missing parent and obtain from them the Voluntary Placement Agreement, if found. If all efforts to locate the parents prove unsuccessful, the planning unit shall

consider the bringing of an applicable court proceeding (abandonment, permanent neglect), to enable appropriate planning for the child as indicated.

Form W-864
Rev. 11/13/75

THE CITY OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES
SPECIAL SERVICES FOR CHILDREN

VOLUNTARY PLACEMENT AGREEMENT
(Prepare in Quadruplicate)

Case No. _____

I (we) _____
residing at _____
House No. and Street Apt. No. or C/O

_____
Borough or P.O. Zip
parent(s) (legal guardian) of _____,
born on _____,
request the Commissioner of Social Services to accept care and custody of my (our) child.

I (We) grant permission to the Commissioner to place my (our) child in a child care setting that he determines to be suitable for my (our) child's care.

I (We) understand that I (we) and the agency with which my (our) child is placed are expected to work cooperatively towards planning for the future of my (our) child, and that the agency will offer whatever help is available to enable me (us) to decide what is best for my (our) child. I (We) understand that it is my (our) right and responsibility to plan with the agency

towards my (our) child's early return home or to actively participate in making alternate plans so that he or she can have the benefit of another permanent home.

I (We) understand that when I (we) want my (our) child discharged from foster care I (we) will request return of my (our) child by giving written notice to the agency caring for my (our) child. A copy of a "Request for Discharge of Child from Foster Care" form is attached to this agreement for my (our) use. The agency must either return my (our) child to me (us) on the date that I (we) request, or within ten days after receiving my (our) request, obtain a Court order before those ten days have passed that directs my (our) child to remain in care.

RESPONSIBILITIES OF COMMISSIONER/AGENCY

I (We) understand that the Commissioner of Social Services or his representatives of the agency with which he places my (our) child for care, in accordance with the plan referred to above and to the extent that such facilities and services are available:

1. agrees to provide care, supervision, room, board, clothing, medical care, dental care and education for my (our) child;
2. agrees to inform me (us) of the name, address and telephone number of the agency caring for my (our) child;
3. agrees to work with me (us) to develop a service plan for my (our) child and me (us), including those casework and other special services needed to carry out the plan;

4. agrees to help me (us) make arrangements to visit my (our) child;
5. agrees to keep me (us) informed, through the agency providing care, about my (our) child's progress, development and health (other than routine health care); and
6. agrees to hear and act upon any complaints I (we) may have about care and services provided to my (our) child and me (us).

RESPONSIBILITIES OF PARENTS

As the parent(s) (legal guardian) of this child, I (we):

1. agree to cooperate with the representatives of the Commissioner of Social Services and the staff of the child care setting where my (our) child is placed to determine and carry out the best plan for my (our) child and me (us);
2. agree to visit and otherwise communicate with my (our) child in accordance with the plan;
3. agree to keep the agency providing care to my (our) child informed about my (our) plans for my (our) child's future care;
4. agree to keep the agency providing care to my (our) child informed of my (our) address, telephone number, place of employment, income and living arrangements;
5. agree to contribute, if possible, towards the cost of my (our) child's care. The amount will be determined in accordance with Department policy and my (our) means and will be stated in a written financial agreement; and
6. agree to the administration of any medical immunizations, tests and treatments, including dental and surgical treatment, that are considered neccessary for the well-being of my (our) child. I (We)

understand that I (we) will be consulted, if possible, whenever surgery is necessary. However, in the event that my (our) child requires emergency surgery, I (we) authorize the Commissioner to consent to such emergency surgery if, for any reason, I (we) cannot be consulted. I (We) also agree that whenever an emergency arises requiring immediate medical and/or surgical care, and in the treating physician's judgment an emergency exists and that any delay caused by an attempt to secure consent for treatment would increase the risk to my (our) child's life or health, necessary care may be provided immediately.

I (We) have received a copy of the Department of Social Services publication entitled, "The Parents' Handbook". I (We) understand that this publication contains additional information about items discussed in this agreement and about other matters related to the foster care of my (our) child. The worker from the Department of Social Services has discussed the contents of the publication with me (us). I (We) understand that I (we) can ask for further explanation or clarification of the information contained in this publication at any time.

I (We) have read and understand this agreement which will be in effect during the time my (our) child is in placement. I (We) have received a copy of this agreement.

Dated this_____day of_____19____

_____

Signature of Parent or Guardian

Signed in the presence of

_____ _____

Signature of Parent or Guardian

ADDITIONAL INFORMATION FOR PARENTS OF CHILDREN IN FOSTER CARE

1. Under the Social Services Law of the State of New York, the parent's (s') failure to visit a child for six successive months, without good reason, may be considered abandonment. Under the Family Court Act of the State of New York, the parent's (s') failure for a period of more than one year following placement to maintain regular contact with or plan for the future of the child, although physically and financially able to do so, may be considered permanent neglect. In either of the above situations, a Court action may be taken to terminate parental rights.
2. According to the provisions of Section 358-a of the Social Services Law, if my (our) child remains in care more than thirty days, a proceeding will be initiated in the Family Court to obtain Court approval of this agreement.

Department of Social Services
Special Services for Children

REQUEST FOR DISCHARGE OF CHILD FROM FOSTER CARE

1. My name:_____
2. My current address:_____
3. My current phone number:_____
4. My child's name:_____

5. My child's birthday:_____
6. The name of the agency caring for my child is:_____
_____
7. I want my child returned to me on: (fill in date)_____

ANSWER THE QUESTIONS BELOW:

1. Will your child live with you after he or she comes home?
   Check one ____ Yes ____ No
   If you answered No, tell us who your child will live with:_____
   Name of person and relationship to you
   _____
   Address
2. Will you be caring for and supervising your child during the day?
   Check one ____ Yes ____ No
   If you answered No, tell us who will care for and supervise your child during the day:
   _____
   Name of person and relationship to you *or* name of agency
3. How do you plan to support your child? (Check all that apply)

   _____ Work
   _____ Public Assistance
   _____ Social Security or Supplementary Security Income (SSI)
   _____ Other

Signed_____ Date_____

APPENDIX 8

NEW YORK CITY POLICY STATEMENT ON VISITATION

The City of New York
Human Resources Administration

MEMORANDUM

DATE: September 16, 1975
TO: Executive Directors, Voluntary Child-Caring Agencies Staff, Special Services for Children
FROM: Carol J. Parry, Assistant Commissioner
Department of Social Services
Special Services for Children
SUBJECT: *Policy Statement on Parental Visiting*

The importance of parental visiting with children in foster care has long been recognized. The attached policy statement has been developed for staff at all levels to affirm this importance and to establish guidelines in this area.

I particularly want to call your attention to item 6 on page 4, which provides information concerning reimbursement to parents for transportation expenses incurred by visiting their children in care. Currently, reimbursement to eligible families for unexceptional costs is covered by the per diem rate and is to be provided directly by the voluntary agency or the SSC direct care program. Exceptional costs (distant upstate visits, out of state visits) may be considered as a separately reimbursable item to agencies. A procedure is being developed to cover these cases, and will be distributed shortly. Until that procedure is ready, please contact the appropriate SSC Unit of Accountability

Team if you require special reimbursement for exceptional costs. Reimbursement to eligible families for unexceptional costs should be currently available under existing policy and need not wait for the new procedure.

I welcome any comments you may have about this statement. In the near future, I hope that this policy statement will be translated into appropriate contract language, and State and City regulations.

POLICY STATEMENT ON PARENTAL VISITING

Carol J. Parry

Assistant Commissioner
Department of Social Services for
Special Services for Children

"Like the frequent monitoring of body temperature information for assessing the health of patients in hospitals, the visitation of children should be carefully scrutinized as the best indicator we have concerning the long term fate of children in care."

This conclusion was drawn by Dr. David Fanshel, co-director of the five year longitudinal investigation of foster care in New York City, known as the Child Welfare Research Project. A key finding of the research is that the association between parental visiting and the discharge of children from care is a critical one. The more frequent the visitation, the more likely the child would return home.

The critical importance of parental visiting with their children in foster care has long been recognized in the

child development literature. These visits are important for many different reasons:

–no matter how troubled or difficult the parents may be, the child may miss them deeply. They are his roots to his past. When he is separated from them, he feels that he has lost a part of himself;
–continuing contact with natural parents has an ameliorative effect on the otherwise detrimental consequences of long-term foster care;
–continuing contact with the natural parents gives the child opportunities to see his parents realistically and rationally and dispel highly irrational feelings and images;
–visits help calm some of the child's irrational separation fears; fears such as the parents are dead, the parents placed the child because they hated him or he was unimportant to them, etc.;
–visits may be therapeutic for the parents if the worker uses them to help the parents be better parents to the placed child, to bring out their "best" when they are with the child;
–if a child is to be returned to his family, visiting is absolutely essential. A child will experience innumerable problems if he is returning to a family where he has become a stranger.

The parent-child tie has deep emotional significance to both the parent and the child. It may be distorted by physical separation but not eliminated.

There is yet another reason why parental visiting is so important. According to New York State law, failure by a parent to visit during a specified period of time without good reason could be grounds for termination of parental rights.

Some agencies have taken concrete actions to facilitate parental visiting. These include supplying carfare to parents, running special buses to agencies on a regular basis and setting aside a few days each year for special activity days for children and their parents. We recognize the value of these activities and wish to commend those agencies that engage in them.

However, despite these gains, the area of parental visiting continues to be characterized by inadequate policies and practices. Too frequently

–during the early part of placement, when children need the support and encouragement of families, they are not permitted visitation. Studies have shown that the children do not "settle better" when their parents are forbidden to see them;
–workers fail to discuss with parents why visiting is so critically important while children are in care;
–agency visiting policies severely limit the number of visits possible;
–visits last for very short periods of time;
–visits take place in very unnatural settings which preclude natural interaction between children and parents;
–placement settings where visits take place are at great distances from the inner city, necessitating the expenditure of time and money;
–regularly scheduled visiting is discouraged;
–honoring requests for visitation by parents is contingent upon the convenience of the foster parent and the agency worker with little regard for the convenience of the family;
–the agency fails to facilitate visits by preparing children and foster parents for the visits;
–agencies fail to emphasize the relevance and

importance of visits to the developmental needs of children of all ages, but especially those under six years of age;
–agencies unilaterally limit or terminate visits without adequate explanation based on consistent standards.

Clearly, our beliefs about the importance of parental visiting are not consistently supported by our practice and policy. This may, in part, be explained by the emphasis we place on another objective: to maintain children in stable situations, free from the trauma and damage that change inevitably creates. This objective is sometimes thought to be inconsistent with an emphasis on parental visiting because visiting often generates problems which can jeopardize stability.

Parental visiting can be problematic. Visits may be characterized by interpersonal stress. There are children who are overwhelmed by anxiety each time they see their parents. Some are upset by their parents' unpredictable or disturbed behavior. Some children may become extremely unhappy and difficult to handle after visits. There are parents who may be hostile toward and critical of their children or the foster parents. Some will be argumentative, uncooperative or unpredictable. A few may even try to sabotage the work of foster parents and the agency.

Nevertheless, both despite these problems and because of them, I must stress how very important it is for agencies to strongly encourage parental visiting. We must weigh and give full value to the important benefits that derive from parent-child visiting against the various problems, ranging from administrative to psychological, that such visiting creates. A child who has recently been placed may become particularly upset after a parental

visit. The response to this must be to work with the child and his parents, not to eliminate the visits. A parent may demonstrate his reluctance to visit by cancelling appointments or arriving late. The response to this must be to reach out to these parents, to explain why their visits are so critical, to offer any assistance that will facilitate the visits, not to ignore the parents. A parent's manner or behavior may be considered dangerous to the child. The response to this must be a skilled explanation about why such behavior is unacceptable and the development of a contract between the worker and parent specifying what behaviors are not acceptable if visiting is to occur, not to unilaterally terminate the parent's right to visit. A parent may request longer visits, evening visits, visits outside of the agency office or foster home, visits on weekends and holidays to the parents' home. The response to these requests must be a serious discussion between the parent and the worker, where the benefits and problems are weighed and a mutual decision agreed upon, not a dismissal out of hand because "it's never been done before" or "it's against agency policy".

Over the years, restrictive visiting policies and practices, based more on the exceptional case rather than the rule, have developed. These policies and practices, where they exist, must be changed, in order to address the real needs of parents and their children. Special Services for Children is affirming the critical importance of parental visiting. As a very first step, all agencies shall be responsible for assuring that each of its congregate facilities and foster homes maintains a register in which the name and address of each person visiting the child can be entered with the date of each visit (existing SBSW rules require this). Extremely infrequent visiting or no visiting by the parent or guardian should trigger an appropriate response. There

will be too many parents who will not visit. Whatever the reason, it is critically important that our reaction to this parental "giving up" is not "giving up" ourselves, but aggressive reaching out. Only in that way can we impress upon parents how very important their visits with their children are.

The following guidelines will help in the development of better visiting policies and practices:

1. An agency-wide policy which prohibits any parent from visiting during the "early part of placement" (up to 6 months) must be changed. Visiting during this time may be prohibited by a Judge. In specific cases, an agency may determine that visits would be dangerous and therefore favors elimination of the visits until the danger no longer exists. The decision must be discussed at length with the parent and be approved by SSC. A parent may request that the decision be reviewed by the Parents' Rights Unit at SSC.
2. At the time a child is placed in a foster care setting, the agency worker must discuss with the parents the critical importance of visiting while the child is in care. The worker should discuss with the parent both the likely positive and negative consequences of a visit. (S)he must stress the urgency of visiting during the early part of placement. Moreover, the worker should state that (s)he will facilitate visits in any way possible.
3. An agency-wide policy which limits visits to once a month or even every two weeks must be changed. The frequency of visiting will depend upon a number of factors (e.g.,

location of agency, number of children at home, number of children in care in other agencies, reason for placement, etc.), but ultimately must be agreed upon by the parent and worker. The parent's desires and needs must take priority over the convenience of the foster parent and the agency. Weekly visits should be encouraged whenever possible for the parent, not prohibited.

4. An agency-wide policy which limits all visits to one hour must be changed. Again, the length of the visit should depend upon several factors, such as how long the parent traveled to the place of the visit, how much it cost, the age of the child and the length of time between visits. Once again, the parent and the agency worker must reach agreement on this matter.
5. Visits must not be limited to small, perhaps poorly equipped visiting areas in agency settings. Visits in the foster home, in the parent's home (where the child is brought by the agency worker) and outdoors should be considered. The location of visits should also be a "contracted" part of the plan.
6. Parents must not be prevented from visiting their children because they are unable to pay for the necessary transportation. Reimbursement to eligible families for transportation costs is covered by the per diem rate and is to be provided directly by the agency. When the children are cared for in SSC Direct Care programs, reimbursement to eligible families for transportation costs is available through the Imprest Fund. Families are eligible for reimbursement for these costs when:
    1. visiting is a part of the service plan which has been developed by the agency and the parent; *and*

2. the family is receiving public assistance; *or*
3. the financial evaluation that is done in accordance with the criteria of SSC Procedure No. 1 shows a budgetary deficit, or there would be such a deficit if the family was required to assume the transportation costs without assistance.

7. Parents must not be prevented from visiting their children when traveling is problematic for reasons other than expense. A parent may want to visit the child, but cannot do so for many different reasons. For example, the parent is ill and is not permitted to leave the home, there are other children in the home who require the presence of the parent, etc. Under such circumstances, consideration should be given to the worker's bringing the child to the parent's home, so that visits are not limited or prevented for those reasons.
8. If a parent wants to set up a regular visiting schedule, and this schedule is consistent with the child's best interests, the worker should incorporate it into the plan. The convenience of the agency or the foster parent can no longer be the determining factor. Moreover, workers must not "test" parental interest and concern by requiring that appointments be made prior to each visit, if the parent expressed interest in a regular visiting schedule.
9. The agency worker must discuss the matter of parental visiting with the child and his foster parent (or other surrogate caretaker). Skillful work in this area should minimize some of the problems created by parental visits.

10. Agencies should provide training for their workers specifically related to child developmental issues. For example, the particular importance of frequent parental visiting for children at different stages of their development should be discussed and translated into agency practice.
11. An agency-wide policy that does not allow a child to visit home on weekends and holidays must be changed. Again, this is a decision that will be influenced by several factors and must utlimately be agreed to by the parent and the agency worker.
12. An agency-wide policy that does not allow evening visits must be changed. This, too, is a decision that will be influenced by several factors and must be agreed to by the parent and agency worker.
13. Limiting or terminating parental visits must be avoided whenever possible. A decision to limit or terminate visits must be carefully explained to a parent and approved by SSC. The agency must inform the parent that the decision can be appealed in the Parents' Rights Unit at SSC or appealed to a Judge.

It is time that all our actions become focused on our articulated goals for families involved in the child welfare system. I am sure that all agency child care staff at all levels share these concerns and goals with me. SSC staff is available to assist agencies in any way possible to help facilitate parental visiting and to help achieve the reunion of families wherever this is possible.

APPENDIX 9

UNREPORTED STATE COURT DECISIONS RE: WALLACE CHILDREN

M E M O R A N D U M

SUPREME COURT, NASSAU COUNTY

TRIAL TERM, PART XXI,
(3/12, 13, 17-21 & 24, 1975)

STATE OF NEW YORK in Relation to PATRICIA A. WALLACE on behalf of CHERYL LYNN WALLACE, PATRICIA ANN WALLACE, CATHLEEN ROSE WALLACE, CYNTHIA MARIE WALLACE, *Petitioners,* – against – GEORGE LHOTAN and DOROTHY LHOTAN, *Respondents,* and JAMES M. SHUART as Commissioner of the Department of Social Services of the County of Nassau, *Respondent.*	By BERNARD F. McCAFFREY J. Dated June 27, 1975 Index No. 11275/74

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Prior to the issue of custody being resolved, it was necessary for this Court to make a determination that the New York State Supreme Court had jurisdiction to determine the issue of custody even though the respondents, Lhotans, had obtained a Federal Court stay against the parties proceeding in this Court.

Thus, in this custody matter by way of a Writ of Habeas Corpus, the petitioner, Patricia A. Wallace, the natural mother of four female children, ages eight, nine, eleven and twelve, is seeking their return and custody. The children are presently living with foster parents, George and Dorothy Lhotan, the respondents in this proceeding.

The petitioner voluntarily placed the four girls and their two younger brothers with the respondent, Department of Social Services of the County of Nassau, for care in September, 1970. The children at no time were surrendered for the purpose of adoption. The two older girls were placed with the Lhotans, as foster parents, on September 4, 1970; the two boys were

placed in a third foster home, and subsequently on September 29, 1972, transferred to the Lhotan's foster home. Following a recommendation of the Department of Social Services the two boys were returned to the custody of their natural mother on December 13, 1972, pursuant to an order of the Family Court.

The Lhotans, as foster care "custodians" have never had custody of the girls. The custody was and presently is in the Department of Social Services.

On or about June 17, 1974, a finding was made by the Psychiatric Consultation Clinic of the Nassau County Mental Health Board that the Lhotan home was not emotionally suited for the Wallace children in that it is rigid and controlling, and prejudicial against the natural mother. In addition, the Nassau County Department of Social Services, after investigation, found there was a deliberate course of conduct by the Lhotans to foster a negative attitude by the children toward their mother, rather than to make efforts to establish a normal relationship under the circumstances. Based upon the aforesaid conclusion, on June 26, 1974, the Department of Social Services informed Mr. and Mrs. Lhotan of their intent to remove the four Wallace girls from their home in compliance with 18 NYCRR 450.10. It was the department's decision at this point to return the two younger girls to their natural mother and place the two older girls in another foster home until their father would be able to care for all of them.

The Lhotans were notified by the Department of Social Services of their right to a conference prior to the removal of the children from their home. Application was made for such conference, but, prior to the scheduled date therefore, the Lhotans obtained a temporary restraining order in the United States District Court for the Southern District of New York, enjoining the Nassau County Department of Social Services from

removing the children from the Lhotan foster home, and, thereafter, against the parties proceeding before this Court in this matter.

At this time the Lhotans joined in a class action pending before a three-judge federal panel convened to determine the constitutionality of the procedures encompassed in the Social Services Law of the State of New York, and promulgated in the Rules and Regulations of the New York State Department of Social Services relating to the removal of children from foster homes. The Lhotans and the Wallace girls joined the federal action as party plaintiffs, and the Department of Social Services of the County of Nassau was joined as a party defendant..

Thereupon, the petitioner, Patricia A. Wallace, instituted this Habeas Corpus proceeding seeking the return to her custody of all four of her children currently in foster care. The Lhotans and the Department were named as respondents in the action.

Thereafter, the Lhotans moved in this Court to dismiss the Writ of Habeas Corpus and stay the proceedings thereunder, contending the Federal Court had jurisdiction of the issues presented in the aforesaid Writ. This Court, after argument, refused to dismiss the Writ or stay further proceedings pending determination of the Federal Court class action. (*State of New York, ex rel. Patricia Wallace v. Lhotan*, 80 Misc. 2d 464, 363 N.Y.S. 2d 425), stating:

> ". . . in order for the state court to be precluded from taking action in a writ of habeas corpus the issue of the custody of the subjects of the writ must be before the federal court. The issue in the class action in front of the federal court is the question of the constitutionality of state law and regulations governing the removal of children from the care of foster parents in New York State. * * *

In the instant action the issue is one of custody, brought before this court by the natural mother (*not a party to the federal court action*) seeking the return of her children that she voluntarily placed in the custody of the Department of Social Services for temporary placement and not for adoption. The court is of the opinion that these are two separate and distinct issues and thus fails to preclude a state court action. * * *

The court notes that there is a long history of cases in which the federal courts have consistently rejected federal jurisdiction over cases where, as in this custody proceeding pending before the state court, there is no constitutional question involved as distinguished from the class action pending in the federal court involving the constitutionality of a statute involving disputes in the domestic relations area. The holdings have consistently stated the principle that domestic relations should be left for the states." * * *

. . . Thus, having determined that in this instance the provisions of CPLR §7003(a) do not mandate dismissal of petitioner's writ of habeas corpus, the question remaining is whether as a matter of comity and justice this court should stay the pending custody proceeding. . . ." * * *

. . . in no respect will the federal court action determine the fitness of the natural mother to resume custody of her children. The custody determination should be made by the State Supreme Court where both statute and reason have placed jurisdiction. . . ."

The decision of this Court was thereafter affirmed on appeal without opinion by the Supreme Court, Appellate Division, Second Department. (May 5, 1975, ____ A.D. 2d ____)

Upon the return day of the stay before the three-judge federal court, the stay originally granted to the Lhotans against the Department of Social Services was vacated, and the prohibition against the parties proceeding in this Court was withdrawn.

In the interim, the Department of Social Services decided that the four children should be returned to the petitioner and that they would participate in the instant proceedings in support of Mrs. Wallace's attempt to gain the return of all four girls.

Also at this time, the Court further determined that it would be in the best interests of the children to appoint Elsie Fried, Esq., as Law Guardian for the four infants pursuant to a motion made just prior to the commencement of the actual hearing of this Writ of Habeas Corpus.

It is the contention of the foster parents that the removal of the children from the home in which two of the children have lived for approximately four and one half years, and the other two have lived for approximately two and one half years, will not promote the best interests of these children and will cause them great psychological damage. Further, the foster parents urge that the petitioner, Patricia Wallace, is unfit to assume the custody of her children by reason of her history of psychological problems, and that she has abandoned her children by infrequently visiting or contacting them while they were in the foster home.

The Courts in New York State have consistently held that the policy of this state is that, unless it is established by the adverse party that the natural parent(s) are unfit to assume the duties and privileges of parenthood, or that the right to parenthood has been abandoned, there is a presumption that it is in the best interests of the children to reside with their natural parent(s) (*People ex rel Kropp v. Shepsky*, 305 N.Y.

465; *Spence-Chapin Adoption Services v. Polk*, 29 N.Y. 2d 196). The Courts have gone so far as to hold that the status of a natural parent is so important that in determining the best interests of the child, the presumption may counterbalance or even outweigh superior material and cultural advantages which may be afforded by adoptive parents. (*Spence-Chapin Adoption Services v. Polk, supra*)

It is apparent from the testimony presented at the hearing that at the time of the voluntary placements in September, 1970, of her six children, Mrs. Wallace was unable to care for the children. This was noted by her own admissions. It was at this time that the petitioner was having psychological problems, which she herself described as a "post partum depression." These problems severely interfered with her ability to function effectively as a mother to these children.

Mrs. Wallace testified that, although she still has a nervous "twitch" for which she takes medication, she has had no medical or psychological problems for a long period of time. It was stated that, although she currently is not under psychological care, she realizes that initially problems may develop during the period of readjustment, particularly if all four of her girls are returned to her at once, and that she is willing to go for counseling and to undertake supportive psychotherapy.

The records of the Department of Social Services and the testimony of their representatives have gone far to show that the petitioner is a fit mother, particularly in light of her demonstrated concern and ability to care for the two sons who were returned to her custody over two years ago.

The Law Guardian, Elsie Fried, Esq., performed exceptional services in this matter and devoted an extensive amount of time and energy on behalf of the

infants. The Court has considered her report on an *advisory* basis only.

The Law Guardian made no recommendations in her report other than to submit what she observed during her visit to the Lhotan home and her unannounced visit to the Wallace home. She found the Lhotan home to be a well-kept home, and in her conversations with the Wallace children they told her they did not want to go back to their mother and wanted to stay with their foster parents. She found, on her unannounced visit, the Wallace home to be clean. Mrs. Fried discussed with Mrs. Wallace's two sons, John age six and Billy age four, school and home activities. Based upon her factual observations it is the Court's opinion that the children apparently appear to be content and well-cared for by their mother.

It is the Court's determination that, aside from an isolated incident of September, 1970, concerning which the testimony is in dispute, there is no credible evidence upon which the Court could base a finding that Mrs. Wallace neglected her children. Nor is there such credible evidence that Mrs. Wallace maintained a course of conduct of entertaining boyfriends in the home, or of leaving the children unattended.

It is, thus, the decision of this Court that the respondents, in their case, have failed to prove that Mrs. Wallace is unfit.

The respondents also contend that the natural mother has abandoned the children by only visiting them infrequently while they were in the foster home and that, therefore, she is not entitled to the return of the children.

Abandonment has been defined as: "a settled purpose to be rid of all parental obligations and to forego all parental rights," (*Matter of Susan W. et al. v. Talbot G.*, 34 N.Y. 2d 76; *Matter of Maxwell*, 4 N.Y.

2d 429). To the contrary, in the matter before this Court the actions of the petitioner in her dealing with the Department of Social Services shows a definite pattern of conduct wherein she sought visitation with her children.

There are several circumstances which contributed to the fact that over the four years of separation Mrs. Wallace had not visited her four daughters regularly. During the first two years, Mrs. Wallace resided in Long Beach while the two youngest daughters lived in Levittown and the two oldest daughters resided in Hicksville. Thereafter, all four daughters resided in Hicksville. Testimony was given at trial to the effect that Mrs. Wallace had applied to the Department of Social Services for a transportation allotment so that she could visit her children. Such was never received as there is no provision therefor by the Departments. This factor, along with the financial limitations of the petitioner and the negative attitude in the Lhotan foster home towards her contributed to her lack of visitation. In addition, the Court finds that a lack of visitation on her part during the early period of her separation from her children is attributable to her emotional condition at the time and a sincere belief on her part that it was in the best interests of the children that she did not visit with them until she was fully capable of coping with her emotional problems. Although testimony did show a lack of regular visitation, there was testimonial and documentary evidence given that Mrs. Wallace always wanted her children returned.

Since a finding of abandonment can be made against a parent only after she has been given the benefit of every controverted fact (*Matter of Bistany*, 239 N.Y. 18; *Matter of Cocozza*, 35 A.D.2d 810), the Court determines, from the credible evidence presented at the hearing, that the respondents have failed to establish that Mrs. Wallace abandoned her children.

The respondents in the briefs submitted by their attorneys argue that the presumption in favor of the natural parent should be discounted by the Court, even though the Court feels it is based on sound legal principles and also reflects considered sound judgment respecting the family and parenthood. It is argued that in its place the Court should consider only what is in the best interests of the children. What the respondents failed to recognize is that in any custody proceeding this is always the paramount concern of the Court. Just because the Court may employ a presumption as a guideline in making a determination does not mean that the Court does not fail to view the whole picture when such a proceeding is undertaken before it. The respondents have also failed to note the pronouncement rendered in the decision wherein the Court denied their application to dismiss the instant Writ. In that decision, a portion of which has been quoted earlier in this determination states and again reiterates:

> "Further, proper consideration must be given to the rights of the petitioner and the most important factor of all is a determination as to the best interests of the Wallace children. This latter factor takes on even added importance as to the discretionary determination of comity for one of the cardinal obligations of the court is that infants are wards of this court. Therefore, it is the responsibility of this court to assure that a just and expeditious determination be made of the custody issue proceeding instituted before this court by their natural mother."

The presumption is but a guideline in protecting the rights of the natural parent. As to the children, the Court, after considering the facts and evidence presented in a custody controversy, may determine what is in the best interests of the infants and, thereafter, in

the exercise of its discretion award custody. (*Matter of Stuart*, 280 N.Y. 248, *Matter of Benitez*, 47 A.D.2d 566)

The respondents in this proceeding sought to establish that the best interests of the children would be served by maintaining the status quo and continue the residence of the children with the present foster parents. To sustain their position they offered the testimony of psychiatrists who testified to the possible traumatic effect of removal of the four Wallace girls from the Lhotan home and relied on a publication written by three noted psychoanalysts espousing a theory of the psychological mother, which in essence states that whoever a child identifies as its mother is its mother.

The petitioner offered as witnesses psychiatrists who testified that, though it may be traumatic at first and outside assistance might be necessary in the early stages of the transition to the mother's residence, in the long run they concluded it would be best for the children to be returned to the natural mother.

This difference of opinion between the psychiatrists is not to be considered surprising. Although considerable advancement has been made in the field of psychiatry, as yet it has not been established as an exact science. Thus, the practice is for each side to select a psychiatrist who supports his opinion. Unfortunately, this will continue to be the practice until such time as, at least in custody matters, expert psychiatric testimony could be designated and presented to the Court on a non-adversary basis with the sole objective of aiding the Court in determining the best interests of its wards. In any event the ultimate determination after evaluating the testimony of the psychiatrists must evolve from the determination of the Court as to the actual psychological effect, both good and bad, a return

of the children to the petitioner might have as opposed to continuing the present course of life of the children.

Testimony offered by the respondents' witnesses was also elicited in an effort to illustrate the reluctance of the children to return to their natural mother. This apprehension of the children to be returned to the natural mother was also manifested in the Court's interview with the children. Though all four of the girls have informed the Court that it is their desire not to be returned to their natural mother and that they prefer to remain with the Lhotans, the negative feelings against their natural mother were most strongly held by the two eldest, and it seemed that the youngest two tended more to parrot the view of their sisters rather than to express their own views, should such individual expression be possible considering their tender years and the length of time away from their mother.

The petitioner endeavored to attribute the children's aversion concerning return to the domineering effect and controlling influence of the respondents. However, in weighing this aspect as to the preference of the children, the Court must also consider the evaluation of respondents' expert psychiatric witness, Dr. Marie Friedman. This witness, who clinically examined the children, offered testimony that any opinion or desire of the children at this time was motivated by a fear of being separated from one another and their desire to continue as a family unit. This witness stated this conclusion particularly in light of the earlier experience of the four girls in having been placed in two separate foster homes.

Although the Court feels there is merit to the petitioner's argument relative to the controlling effect of the Lhotans over the conduct of the children, it also notes that the foster parents did show love and concern towards the children.

Yet, it is the opinion of the Court that the main concern of the children in their evaluation of their present and future lives is the fear, based upon the circumstance of their initial placement by the Department of Social Services, of being separated from one another.

The respondents, in attempting to resist the efforts of Mrs. Wallace to regain custody of her children, have failed to move affirmatively for any type of relief. The respondents do not have, nor do they seek legal custody. Legal custody when the children were placed with the Lhotans remained with Nassau County Department of Social Services. The Wallace children were placed on a temporary foster parent basis with the Lhotans. Persons accepting such foster children do so with the understanding that the children will return to their natural parents as soon as feasible and one of their responsibilities is to prepare the children psychologically for their contemplated return to their natural home. (*Matter of Jewish Child Care Association of New York*, 5 N.Y.2d 222)

It was the finding of the Department of Social Services that the Lhotans failed to prepare the children for such return and that, should custody not be awarded to Mrs. Wallace, the Department would nevertheless remove the children from the Lhotans and place them elsewhere.

The Court is not predicating its decision on what steps the Department of Social Services may or may not legally take as to the removal and transfer of children from one foster home to another, nor is the possibility of such a further referral to another foster home a factor in the Court's determination. The Court is predicating its determination solely on what it deems to be in the best interests of the children, and this

determination of the Department of Social Services is being set forth only to reflect that the Department deems it to be in the best interests of the children to remove them from the Lhotan foster home.

The Court, in arriving at its conclusions, was mindful that, although the petitioner has assumed the surname (Wallace) of the father of her children, she was never formally or legally married to John Wallace.

Although the respondents were afforded an opportunity to pose questions relative to this circumstance, they have done so only to a limited extent and have not placed in issue any facts which would prevent the Court from arriving at any of the aforementioned determinations.

After having carefully reviewed the record (1113 pages of transcript) of the extensive eight day hearing, the affidavits submitted by the petitioner demanding the return of the children, the briefs submitted by the petitioner, Mrs. Wallace, the extensive brief submitted by the respondents, Lhotans, consisting of 115 pages, and the report submitted by the Law Guardian, Elsie Fried, Esq., and after having interviewed all four of the Wallace girls, the Court has come to the conclusion, based upon all the credible evidence, that the best interests of the four girls shall be served by their return to the petitioner, their natural mother.

Accordingly, this Writ of Habeas Corpus is sustained.

Furthermore, though it is of critical importance that all of the children be afforded the opportunity to be reunited as a family unit, the Court concludes that it would be in the best interests of all concerned that this be accomplished in a staged or programmed return. The Court directs the respondents, Lhotans, to return the two youngest girls, Cathleen and Cynthia, within ten days of the date of service upon them of the order signed simultaneously herewith, to the natural mother,

Mrs. Wallace, and thirty days thereafter the remaining two eldest girls, Cheryl and Patricia, shall be returned to the natural mother, Mrs. Wallace.

The respondent, Nassau County Department of Social Services, is directed to discharge the custody of Cheryl Wallace, Patricia Wallace, Cathleen Wallace and Cynthia Wallace to their natural mother, Patricia A. Wallace.

However, the return of the Wallace children to their mother shall be under the supervision of the Nassau County Department of Social Services and the said Department of Social Services shall continue the supervision of the Wallace children for a period of one year. Any time during, or at the expiration of the aforesaid year the Department of Social Services may terminate further supervision or make such application to the Court as it may deem to be in the best interests of the children.

During the course of the trial there was testimony to the effect that during the period of re-adjustment with her four children it might be necessary for her to undertake supportive psychotherapy. Mrs. Wallace stated her willingness to participate in any such psychotherapy to assist her in coping with any problems which might arise out of a return of the four girls to her care. Therefore, the petitioner, Mrs. Wallace, is directed to adhere to any directive which the Nassau County Department of Social Services makes, particularly should they determine that it is necessary for the petitioner to be referred to the Nassau County Psychiatric Consultation Clinic or the Family Court Mental Health Clinic for supportive psychotherapy during the period of re-adjustment with her four female children.

In addition to such other supportive services as may be appropriate, the Nassau County Department of Social Services shall provide a homemaker to assist Mrs. Wallace until such time as the Department of Social

Services decides that homemaking services are no longer needed.

Short Form Order signed simultaneously herewith.

J.S.C.

SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK

TRIAL TERM, PART XXI – NASSAU COUNTY

Present:

HON. BERNARD F. McCAFFREY

Justice.

STATE OF NEW YORK in Relation to PATRICIA A. WALLACE on behalf of CHERYL LYNN WALLACE, PATRICIA ANN WALLACE, CATHLEEN ROSE WALLACE, CYNTHIA MARIE WALLACE, *Petitioners,*	)	Index Number 11275, 1974
	)	Hearing Date March 12, 13, 17-21 and 24, 1975
– against –	)	
GEORGE LHOTAN and DOROTHY LHOTAN, *Respondents,*	)	Motion Cal. Number
and	)	Trial Cal. Number
JAMES M. SHUART as Commissioner of the Department of Social Services of the County of Nassau, *Respondent.*	)	

The following papers number 1 to read on this application for a Writ of Habeas Corpus

Papers Numbered

Notice of Motion/Order to Show Cause .....
Answering Affidavits .....
Replying Affidavits .....
Affidavits .....
Filed Papers .....
Pleadings – Exhibits – Stipulation .....
Briefs: Plaintiff's/Petitioner's .....
Defendant's/Respondent's .....

Upon the foregoing papers it is ordered that this application for a Writ of Habeas Corpus, after a hearing, is sustained.

The respondent foster parents, Lhotans, are directed within ten days of service of a copy of this order on them, to return the two girls, Cathleen Wallace and Cynthia Wallace, to their natural mother, Patricia A. Wallace, and thirty days thereafter the respondents, Lhotans, are directed to return the remaining two girls, Cheryl Wallace and Patricia Wallace, to their natural mother.

However, the return of the Wallace children to their mother shall be under the supervision of the Nassau County Department of Social Services; and the Department of Social Services shall continue the supervision of the Wallace children for a period of one year. At any time during this period, or at the expiration of the aforesaid year, the Department of Social Services may, if it deems it in the best interests of the children, terminate further supervision or make such application to the Court as it may deem to be in the best interests of the children.

Further, the petitioner, Mrs. Wallace, is directed to adhere to any directive which the Nassau County

Department of Social Services makes, particularly should they determine that it is necessary for the petitioner to be referred to the Nassau County Psychiatric Consultation Clinic or the Family Court Mental Health Clinic for supportive psychotherapy during the period of readjustment with her four female children.

In addition to whatever supportive services it appropriates, the Nassau County Department of Social Services shall reinstitute homemaker service to assist Mrs. Wallace until such time as the Department of Social Services decide that homemaking service is not needed.

See memorandum decision filed simultaneously herewith.

Relator is directed to serve a copy of this order on the respondents, Lhotans, and the Nassau County Department of Social Services.

Dated JUL 8 1975

_____
J. S. C.

SUPREME COURT, NASSAU COUNTY

TRIAL TERM, PART XXI
(9/8, 9, 10, 11, 12, 16 & 19, 1975)

STATE OF NEW YORK in Relation to PATRICIA A. WALLACE on behalf of CHERYL LYNN WALLACE, PATRICIA ANN WALLACE, CATHLEEN ROSE WALLACE, CYNTHIA MARIE WALLACE,

Petitioners,

– against –

GEORGE LHOTAN and DOROTHY LHOTAN,

Respondents,

and

JAMES M. SHUART as Commissioner of the Department of Social Services of the County of Nassau,

Respondent.

BY BERNARD F. McCAFFREY

DATED October 27, 1975

Index No. 11275/74

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By order dated July 8, 1975, this Court (Mr. Justice McCaffrey) granted the Writ of Habeas Corpus brought by petitioner, Patricia A. Wallace, and directed that the foster parents, Mr. and Mrs. Lhotan, return the four children to their natural mother, Mrs. Wallace.

The children were never returned, and at this time are still with the foster parents, Lhotans, in that the respondents, Lhotans, obtained from Part V of this Court an Order to Show Cause to re-open the hearing based on new evidence, and staying the return of the children.

This matter has already been the subject of an extensive hearing also involving a number of adjournments and motions, including a jurisdictional determination by this Court and affirmed by the Appellate Division that a pending federal court matter does not constitute a stay of this custody matter.

However, in the interest of justice this Court granted respondents' application and the hearing was re-opened and further testimony was taken on behalf of the parties.

In this custody matter the petitioner, Patricia A. Wallace, had voluntarily placed the four girls, Cheryl age 13, Patricia age 12, Cathleen age 10, and Cynthia age 9, and their two younger brothers with the respondent Department of Social Services, in September, 1970. The children at no time were surrendered for the purpose of adoption. The two older girls were placed with the Lhotans, as foster parents, on September 4, 1970; the two boys were placed in a second foster home; and the two younger girls were placed in a third foster home, and subsequently on September 29, 1972, transferred to the Lhotan's foster home. Following a recommendation of the Department of Social Services the two boys were returned to the custody of their natural mother on December 13, 1972, pursuant to an order of the Family Court.

The custody of the Wallace children was in the Department of Social Services. The Lhotans, as foster care "custodians" have never had custody of the girls, nor have they ever by affidavit or testimony in this proceeding declared their intention to adopt the Wallace children, if they were available for adoption.

At the re-opened hearing the Court granted extensive latitude to the respondents, Lhotans, to produce witnesses and submit any further "new evidence" to support their application that the Court should reconsider its previous decision granting the Writ of Habeas Corpus brought by the petitioner.

The Court is not bound by the strict rules of evidence in a custody hearing. Rather, custody matters should not be actual adversary proceedings, but all relevant evidence should be admitted that can assist the Court in its capacity as parens patriae in making the important and traumatic determination as to what is in the best interests of the infants.

However, though the respondents, Lhotans, called a number of witnesses, their testimony at best was cumulative and in no way could be considered as new evidence to support the respondents Lhotans' contention that the petitioner, Mrs. Wallace, was not a fit and proper person to resume the custody and care of her children.

All of the witnesses testified to isolated instances which occurred several years ago, such as that Mrs. Wallace was not a good housekeeper and that the apartment was not maintained in a neat and clean manner; and that on a number of occasions they noticed that there was little or no food in the apartment. Though there was some undocumented testimony that on a couple of isolated unspecified occasions Mrs. Wallace appeared to be intoxicated; however, none of them testified as to her drinking any

intoxicating beverages other than beer. There was also further unsubstantiated testimony that Mrs. Wallace was living with a Benny Bogutzski, but this at best was innuendo evidence and there was no credible evidence that such relationship, if any, in any way affected the best interests of the children.

Most of the isolated instances related to incidents that occurred years ago, as typified by the testimony of one of the baby sitters who testified that the house was messy when she baby sat for Mrs. Wallace in 1966.

Rather than the new hearing establishing that Mrs. Wallace was not a fit and proper mother, the testimony adduced at the hearing clearly established to the contrary. The most credible and relevant evidence was that given by Mr. and Mrs. Mortem Hansen, who were the foster parents for the two Wallace boys from 1970 through 1972. They testified that when they returned the boys to the petitioner in compliance with the Family Court order, they did so with serious concern for the boys' future. They further testified that they have thus maintained a continued relationship with the Wallace family; and that on those regular occasions when they have visited her home they have always found it to be amply stocked with the necessary food, and that the boys' material, emotional and parental needs are amply provided for. The Hansens further testified that during the period of time the Wallace boys were in their care they developed a strong feeling of love and concern for the boys as though they were their own; and that at all times that they have visited the Wallace home, or on those occasions when they have entertained Mrs. Wallace and the boys in their own home, they have noticed there exists a like bond of love and concern between Mrs. Wallace and the boys. Furthermore, the boys appear to have made a complete and successful transition back with their mother, and

have readily involved themselves in the normal boy's activities.

The Court finds that it would be unduly traumatic and detrimental to the best interests of the children to subject them to a further court appearance; and the Court further finds that if they were to testify, all four of the children would expressly state that it is their desire to remain with the foster parents, Lhotans, and not return to their natural mother. This is the same desire that they had expressed to the Court at the time of the original hearing, and as presently expressed by them to the Law Guardian.

Therefore, after hearing and reviewing all of the testimony and evidence introduced at the re-opened hearing, the Court reaffirms its prior decision of June 27, 1975 granting the Writ of Habeas Corpus brought by the petitioner, Patricia A. Wallace, for custody of Cheryl, Patricia, Cathleen and Cynthia.

The Court further notes that in its original decision of June 27, 1975, it stated that:

> "* * * though it is of critical importance that all of the children be afforded the opportunity to be reunited as a family unit, the Court concludes that it would be in the best interests of all concerned that this is accomplished in a staged or programmed return. The Court directs the respondents, Lhotans, to return the two youngest girls, Cathleen and Cynthia, within ten days of the date of service upon them of the order signed simultaneously herewith, to the natural mother, Mrs. Wallace, and thirty days thereafter the remaining two eldest girls, Cheryl and Patricia, shall be returned to the natural mother, Mrs. Wallace."

The Court also notes that in its prior decision provision was made for continuous service by the Department of Social Services, and for supportive

physiotherapy supervision to be rendered to Mrs. Wallace and the children to assist the parties during the transition and readjustment period.

Further, the Court notes that custody matters are often the subject of media coverage. However, in this long embittered custody matter, the children have been *unduly* and detrimentally exposed to the media in a calculated matter, while in the custodial care of the respondents, Lhotans. This conduct has continued since the time of this Court's order of July 8, 1975, and the Court has been advised that, without obtaining the approval of the Law Guardian, the children have recently been permitted to be interviewed by a reporter doing a story on custody matters in spite of the fact that some of the children have stated that because of past newspaper stories they have been embarrassed by classmates. Thus, this continuous detrimental conduct has dramatically added to the complexities and problems of the immediate return of the children to their natural mother.

Therefore, the Court directs the parties, including the respondent, Nassau County Department of Social Services, to submit to the Court within ten days of the order herein a proposal setting forth recommendations for an orderly and constructive return of the children to their natural mother, taking into consideration the expressed desire of all four girls that they remain together and the hostile atmosphere created towards the immediate return of the children to their mother; and that because of the stay of the court's prior order, the Department of Social Services has not provided the mother and children with the supportive physiotherapy for purposes of assisting them during the transition and readjustment period.

Short Form Order signed herewith.

_____

J. S. C.

APPENDIX 10

UNREPORTED STATE COURT DECISION RE: NELSON/SHABAZZ CHILDREN

Sec. 1051 F.C.A. Child Protective Form 10-14 (July,

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF Bronx

In the Matter of Nelson Children A Child ____ under Sixteen (Eighteen) Years of Age Alleged to be (Abused) (and) (Neglected) by Dorothy & Ronald Nelson Respondent(s)	Docket No. N-2383-87/74 ORDER DISMISSING PETITION

The petition of Comm. of Soc. Svce. under Article 10 of the Family Court Act, sworn to on 7/22/74, having been filed in this Court, alleging that the above named child _____ under sixteen (eighteen) years of age is (are) a (neglected) (abused) child _____ and that Dorothy & Ronald Nelson (is) (are) the (parent(s)) (person(s) legally responsible for the care) of said child _____ ; and

The matter having duly come on to be heard before this Court and the Court having found that the said (parent(s)) (person(s) legally responsible for the care) of said child _____ ((was) (were) present at the hearing and have been served with a copy of the petition) (every reasonable effort had been made to effect service of the petition upon the said (parent(s))

(person(s) legally responsible for the care) of said child _____ under Section 1036 or 1037 of the Family Court Act, and the following having appeared herein: C.C., Atty. for Resp. Mother, resp. mo., caseworker, L.G.

NOW, after examination and inquiry into the facts and circumstances of the case and after hearing the proofs and testimony offered in relation thereto, it is hereby

ADJUDGED that the allegations of the petition are not supported by a fair preponderance of evidence

ADJUDGED Children #1-5 to be discharged to respondent Mother; and it is therefore

ORDERED that the petition herein be and the same hereby is dismissed (and bail heréby is exonerated).

Signed at 1109 Carroll Place, New York, the day of June 24, 1975

THIS IS TO CERTIFY THAT THIS IS A TRUE COPY OF *the foregoing order* MADE IN THE MATTER DESIGNATED IN SUCH COPY AND SHOWN BY THE RECORDS OF THE FAMILY COURT OF THE STATE OF NEW YORK, WITHIN THE CITY OF NEW YORK, FOR THE COUNTY OF BRONX

_____
CLERK OF COURT

Date 6/24 1975

_____
Family Court Judge

Bronx
County

APPENDIX 11

UNREPORTED STATE COURT DECISION RE: GANDY CHILDREN

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CITY OF NEW YORK

In the Matter of the Review of the Foster Care Status of	)	
ERIC and DANIELLE GANDY	)	Docket Nos. K-2663/74S 2664/74S
Pursuant to Section 392 of the Social Services Law	)	

Appearances: W. Bernard Richland, Corporation Counsel of the City of New York, by Dorothy G. Elfenbein, Assistant Corporation Counsel,
220 Church Street
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Counsel for the Commissioner of the Department of Social Services.

Terry McGuire, Esq.,
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Marcia Robinson Lowry and
Stephen Shapiro, Esqs.,
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Counsel for Petitioners.

Thomas Burke, Esq.,
Burke, Burke and Burke,
1472 Broadway,
New York, New York 10036,
Law Guardian for the Children.

Yvonne Lawrence, Esq.,
11 Broadway,
New York, New York 10004,
Counsel for the natural mother.

OTTEN, J.: Eric Gandy, who is almost 12 years old (born 2/9/65), and his 8-½ year old sister, Danielle, have been in the same foster home for almost seven years.

The children were left by their mother with a Mrs. Jackson, a neighbor, and were delivered by her to the care of the Commissioner of Social Services in April, 1968. They were placed in foster care through Catholic Guardian Society with the foster mother. The biological mother had no contact with the children for over six years, and her whereabouts were unknown until recently when she responded to a notice in legal proceedings.

The foster mother is a 55-year old woman who is crippled by a condition described by a medical witness as arthritis in the lumbar region of the spine. Although her mobility is severely limited, she has been able to care for the children with the assistance of others, particularly a 21-year old grandson and an unrelated gentleman who has apparently established a stable relationship with her and the children. She also utilizes the services of the agency, Catholic Guardian Society, and its social workers.

Although the biological mother was well represented by able counsel at the hearing, she does not appear to be a plausible resource for the children now or in the future.

The foster mother would like to adopt the children. However, her physical disability requires that, in the best interests of the children, the services of the agency be available to her.

Foster care continued.

The Court refrains at this time from making any directive as to visitation, other than to state that visitation should be permitted only if the children are accepting thereof.

Notify parties and attorneys.

Dated: November 22, 1976.

Louis Otten
Judge of the Family Court.

APPENDIX 12

UNREPORTED STATE COURT DECISION

New York Law Journal
November 1, 1976
(page 1, column 6)

Appellate Division

First Department

IN THE MATTER OF THE REVIEW OF THE FOSTER CARE STATUS OF LOUIS F. PURSUANT TO SECTION 392 OF THE SOCIAL SERVICES LAW.*

Decided October 21, 1976.

Before *Kupferman, J. P.; Lupiano, Capozzoli, Lane* and *Nunez, J. J.*

Appeal from an order of the Family Court, New York County (Otten, J.), entered June 3, 1976, denying an application of appellants foster parents for pre-hearing disclosure of confidential records of respondents Catholic Home Bureau and New York City Department of Social Services. . . .

Lupiano, J. – This is a proceeding initiated by foster parents pursuant to Social Services Law Section 392 to review the foster care status of the child Louis F. wherein they seek an order directing the authorized agency to institute a proceeding to legally free such child for adoption, and upon a failure by such agency to institute such a proceeding, permitting them to institute such a proceeding. The Department of Social

*Excerpt

Services of the City of New York seeks to continue the child in foster care in that the agency is working toward a plan of discharge to the natural mother in the immediate future, but that it is contrary to the child's best interest to return him at this time. The foster parents moved for pre-hearing disclosure of certain records of the respondents relating to the child and his natural (biologic) parents which motion was denied by the Family Court with the brief and only observation that "(t)here is no sufficient showing of necessity to permit such disclosure."

Succinctly stated, the information sought by the foster parents is as follows: (1) all entries relating to visits between the infant and each of his natural parents, including entries relevant to reactions to such visits on the part of the foster parents, (2) all entries relating to plans of the natural parents to remove the children from placement and efforts by the agency to strengthen the relationship between the child and the natural parents, (3) all entries relating to home environment and the attitudes of the natural parents, (4) all entries relating to any history of mental illness, drug use, alcoholism, child neglect, child misconduct, criminal activity and contagious illness of either natural parent, (5) the names, addresses and birth dates of the natural parents, (6) all entries relevant to the child's present state of health and medical history, and (7) all entries relating to the facts surrounding the placement of the infant by the natural parents.

Opposition to disclosure voiced by the respondents Department of Social Services and Catholic Home Bureau, and by the natural mother may be summarized as follows:

There is no showing of necessity for access to this vast amount of material in that much of it is irrelevant or privileged; one of the foster parents was present

during the foster child's visitation with his natural mother; the cooperation by the natural mother with the authorized agency was developed and exists under the aegis of confidentiality and to disclose such material would be injurious to the relationship between said mother and the social worker with consequent hampering of the agency's work; the foster parents are engaged in a full-scale fishing expedition; the request for disclosure of plans by the agency and natural mother to strengthen the parental relationship should be denied as the instant proceeding is designed to evaluate the *current* situation and is not a permanent neglect proceeding, and the health of the infant is known to the foster parents.

The predicate urged by the foster parents for access to the information sought is advice by a case worker that the natural mother has suffered psychological difficulties which prevent her from regaining custody and is living with a man not her husband, and the absence of knowledge on the foster parents' part as to the biologic parents.

In *Matter of Carla L.*, 45 A.D.2d 375 (1st Dept., 1974), the issue of confidentiality of an authorized agency's case record warranted the procedural safeguard of *in camera* inspection by the Family Court. It was noted that

"Section 372 of the Social Services Law specifically enumerates a natural parent as among those to whom disclosure may be afforded. Although not so enumerated in Section 372 of the Social Services Law, a foster parent is given status as a party in a Section 392 foster care review proceeding and, as already stated, it is Section 392 which serves as the fountainhead for the rights of the parties within a foster care review proceeding. Consequently, an opportunity should be afforded a foster parent to obtain disclosure when appropriate in a foster care review proceeding.

"However, the different relationships inherent in the foster parent and natural parent require a different procedural method wherein and whereby such disclosure may be obtained by a foster parent. Recognition of these relationships and the absence of a foster parent from the designated classes to whom disclosure may be afforded in Section 372 of the Social Services Law mandate the conclusion that such disclosure may be had only upon a proper showing of necessity, coupled with *in camera* viewing by the Family Court. Initial disclosure by way of stipulation may be had, but only where court approval is obtained. Thus, the Family Court is of necessity involved *ab initio* with the disclosure process when disclosure is sought by a foster parent" (45 A.D.2d, 375, at 386-387). . . .